IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 No. 769

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH; MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST AND ROBERT FELDER, *Appellants,*

vs.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA, *Appellee.*

On Appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

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OPINIONS DELIVERED IN THE COURTS BELOW

The majority opinion of the Supreme Court of Pennsylvania, the concurring opinion of Mr. Justice Bell, and the dissenting opinion of Mr. Justice Musmanno, App. A, p. 25, *et seq.*, are reported at 386 Pa. 548, 127 A. 2d 287 (1956). The opinion of the Orphans' Court of Philadelphia

County, sitting en banc (R. 170a[1]), dismissing exceptions to the opinion of the hearing judge, and the opinion of the hearing judge of the Orphans' Court of Philadelphia County (R. 119a) are reported at 4 D. & C. 2d 671 (Orph. Ct., Phila., 1955).

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion of the Supreme Court of Pennsylvania held that the Board of Directors of City Trusts of the City of Philadelphia, an official governmental body, acting pursuant to the Act of June 30, 1869, P. L. 1276, 53 PURD. STAT. §6481-6486, could exclude appellants Foust and Felder from Girard College solely on the ground that they were Negroes, and that such exclusion did not violate the Fourteenth Amendment. The opinion was filed on November 12, 1956, and the judgment entered the same day. A timely petition for reargument, again specifically raising, *inter alia*, the constitutionality of the Act of June 30, 1869, filed in the Supreme Court of Pennsylvania on December 5, 1956, was denied by that Court on December 20, 1956. Notice of appeal to this Court was filed in the Supreme Court of Pennsylvania on February 8, 1957.

The appeal jurisdiction of this Court is invoked under 28 U. S. C. §1257(2), in that the validity of a state statute —the Act of June 30, 1869, P. L. 1276, *supra*—on the ground of its repugnancy to the Constitution of the United States has been drawn into question and the decision of the Supreme Court of Pennsylvania was in favor of its validity.

The court below having decided that city officials authorized to act under, and acting pursuant to, the Act of June 30, 1869, could exclude Negroes solely because of their

[1] "R" refers to the printed record filed with the Supreme Court of Pennsylvania and certified to this Court.

race from the institution administered by the City of Philadelphia, the following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal: *Illinois ex rel McCollum v. Board of Education*, 333 U. S. 203, 206; *Hamilton v. University of California*, 293 U. S. 245, 258; *Atchison, Topeka & S. F. R. Co. v. Public Utilities Commission*, 346 U. S. 346, 348; *Dahnke-Walker Milling Company v. Bondurant*, 257 U. S. 282.

In the alternative, pursuant to 28 U. S. C. §2103 (see *May v. Anderson*, 345 U. S. 528; *Union National Bank v. Lamb*, 337 U. S. 38, 39-40), the certiorari jurisdiction of this Court is invoked under 28 U. S. C. §1257(3), in that rights, privileges and immunities, and equal protection of the law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States have been denied.

STATUTES INVOLVED

The statute asserted to be invalid as applied is the Act of the Pennsylvania Legislature of June 30, 1869, P. L. 1276, which is printed in Appendix B, *infra*, p. 112. The other statutory provisions involved are the following Acts of the Pennsylvania Legislature, pertinent portions of which are printed in Appendix B, *infra*, p. 115, et seq.: Act of March 24, 1832, P. L. 176; Act of April 4, 1832, P. L. 275; Act of February 27, 1847, P. L. 178; Act of April 20, 1853, P. L. 624; and Act of May 23, 1887, P. L. 168. Citations to pertinent ordinances of the City of Philadelphia appear in Appendix C, *infra*, p. 121 et seq.

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

The Will of Stephen Girard, which was probated in 1831, left the bulk of his vast estate to the City of Philadelphia for the purpose of establishing and maintaining Girard College, an institution for the education and training of "poor male white orphan children." The City was enabled to accept the gift in accordance with its terms only by reason of state legislative enactments. Throughout the intervening years, the College has been administered solely by city officials whose administration has been made possible only by a substantial number of implementing state statutes and municipal ordinances. The present administering body is the Board of Directors of City Trusts, created by the Act of June 30, 1869, P. L. 1276, to act "for and in the name of the . . . City [of Philadelphia]." It is this agency of the City government which rejected the application of appellant Negro boys for admission solely because of their race.

The questions presented are:

1. Whether the Pennsylvania Act of June 30, 1869, P. L. 1276, violates the Fourteenth Amendment to the Constitution of the United States because the Act has been interpreted by the Supreme Court of Pennsylvania—in the face of the constitutional objection—to authorize the City of Philadelphia to exclude Negroes from Girard College solely because of their race.

2. Whether the Pennsylvania Act of June 30, 1869, P. L. 1276, violates the Fourteenth Amendment to the Constitution of the United States because the Act has been interpreted by the Supreme Court of Pennsylvania—in the face of the constitutional objection—to authorize city officials and agents acting pursuant thereto, to exclude Negroes from Girard College despite the substantial legislative and other governmental aid given to that institution.

3. Whether the administration of Girard College by the City of Philadelphia since its inception together with

the additional state and city implementing legislation constitutes "state action" within the meaning of the Fourteenth Amendment, precluding denial of admission to the College solely because of race.

4. Whether the determination by the state courts of Pennsylvania, that the provision in Girard's Will describing the College to be for poor male white orphan children is a defense to a suit for admission by a Negro to Girard College, violates the Fourteenth Amendment.[2]

STATEMENT OF THE CASE

This appeal grows out of the fact that the City of Philadelphia on March 1, 1954, denied the Negro appellants admission to Girard College solely because of their race, assigning as justification therefor certain provisions of Girard's Will under which the College was established and the City of Philadelphia designated to administer it.

I. THE BACKGROUND

Stephen Girard died on December 28, 1831. The bulk of his vast estate was left to the City of Philadelphia for various municipal purposes, the most important of these being the establishment of Girard College. Article XXI of the Will named the City of Philadelphia trustee of $2,000,000 to establish and operate a school for "poor male white orphan children" plus the residue of Girard's estate:

1. For the improvement and maintenance of Girard College;

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[2] The Commonwealth of Pennsylvania, the City of Philadelphia, the Mayor of the City of Philadelphia and the Philadelphia Commission on Human Relations take no position on this question because they deem it unnecessary to a decision in this matter. Appellants Foust and Felder present this question because they deem it to be a substantial federal question in the light of *Rice v. Sioux City Cemetery*, 348 U. S. 880, *grant of certiorari explained in* 349 U. S. 70, 72-74, and *Black v. Cutter Laboratory*, 351 U. S. 292.

2. For the provision of a better police force for the City;

3. To enable the City to improve City property and the general appearance of the City.

Girard bequeathed an additional $300,000 to the Commonwealth of Pennsylvania on the proviso that it enact within one year after his death the necessary enabling legislation to carry out the terms of his Will. (Article XXIII.) Girard provided that if the City of Philadelphia failed to establish Girard College the residue of his estate and the $2,000,000 were to pass to the Commonwealth, and in default thereof, to the United States.

Article XXI of the Will provides for the organization, staff and composition of the student body of the College (Article XXI, §2). Before an orphan may be admitted to the College there must first be furnished to the City of Philadelphia a release by his guardian (id., §5). Orphan boys born in the City of Philadelphia are given first priority among the applicants (id., §6). The City of Philadelphia is given the power to bind out the orphans after their graduation from the College to suitable occupations and manufactures (id., §9). Further, this Article (1) declared that Girard left wide discretion to the City government of Philadelphia in relation to the management, organization and administration of Girard College and (2) expressed the belief that the extent of his gift will make the people of Philadelphia observe special care in the selection of their public officials.

To comply with Girard's requirements and to make the Commonwealth eligible for the $300,000, the Pennsylvania Legislature immediately enacted the Act of March 24, 1832, P. L. 176, and the Act of April 4, 1832, P. L. 275, see 53 PURD. STAT. §§6791, 7411, 7433. The former directs the constituted authorities of Philadelphia to carry Girard's Will into effect. The second Act provides:

"The Select and Common Council of the city of Philadelphia, shall be and they are hereby authorized to

provide by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard." (App. B, *infra*, p. 116.)

Other legislation was enacted, all of which has been recognized by the courts of Pennsylvania as the foundation and support of what Girard wanted, or, in the words of the court below, "in aid of certain provisions of the Will." (App. A, *infra*, p. 28.) For example, Article XXI, par. 5 of Girard's Will stipulated that no student could be admitted to the College until the Legislature enacted a statute giving to the Mayor of the City of Philadelphia the power and duty to prevent relatives from interfering with, or withdrawing, any orphans from the College. The Legislature so provided, just before the College first opened. Act of February 27, 1847, P. L. 178, 53 PURD. STAT. §6792. This Act is "a special Act giving legislative sanction to Clause XXI, par. 5 of Girard's Will. It was passed to implement the Will." *Mangione, Minor*, 4 Fiduc. 517, 521 (Orph. Ct., Phila., 1954).

The same Act gave legislative sanction to paragraph 9 of Article XXI of Girard's Will, which required that students who reached 18 years of age were to be bound out by the City of Philadelphia to suitable occupations until they reached the age of 21. 53 PURD. STAT. §6793. *Burns Estate*, 2 D. & C. 2d 579, 580 (Orph. Ct., Phila., 1955). It also gave authority to the City of Philadelphia to undertake this duty. Still another Act had to be passed to give the City authority and power to bind out the orphans as apprentices as required by the Will. Act of April 20, 1853, P. L. 624, 53 PURD. STAT. §6798. (See App. B, *infra*, p. 116-119.)

There were in addition a host of municipal ordinances, all stemming from the grant of power from the State, necessary to effectuate the Will. On March 21, 1833, for example, the Philadelphia City Council passed an ordinance providing for the construction of the school, naming it the

Girard College for Orphans, and requiring all building plans to be approved by Council. On July 14, 1836, an ordinance was adopted making provision for the purchase of books and paraphernalia. On January 28, 1841, Council ordained that all contracts entered into by the College had to be validated by Council. Committees were appointed by Council to handle the administration of the College.

The cornerstone of Girard College was laid on July 14, 1832. It was officially opened for student occupation on January 1, 1848. On November 9, 1848, Council appointed a visitation committee to visit the College once a month and report on its findings to Council. Indeed, between September 15, 1832, and December 18, 1869, the Council enacted more than forty different ordinances devoted exclusively to the Girard College. See App. C, *infra*, p. 121; dissenting opinion, App. A, *infra*, p. 89.

Until 1869 the College was in the direct charge of City Council and its various Committees. As a result of dissatisfaction with the manner in which the College was managed, the management and direction of Girard College was transferred by the State Legislature to a Board of Directors of City Trusts of the City of Philadelphia, created by the Act of June 30, 1869, P. L. 1276, 53 PURD. STAT. §6481. This change was held by the Supreme Court of Pennsylvania to be merely a reallocation of city functions from one city agency to another city agency.[3] *Philadelphia v. Fox*, 64 Pa. 169 (1870). These directors "in the discharge of their duties, and within the scope of their powers aforesaid, shall be considered agents or officers of said city." (§6 of the Act of June 30, 1869, App. B, *infra*, p. 114.) It is, moreover, the statutory duty of the directors

[3] The fact that the Board was appointed and not elected, as was City Council, did not invalidate the Act, although Girard's Will expressed the belief that his fellow citizens would "observe and evince especial care" in the selection of their mayor and councilmen in view of the size of his estate which they would administer. Since the Legislature could repeal the City's charter, it could amend it by reallocating functions from elected to appointed officials, and this Girard must have known: *Philadelphia v. Fox*, supra.

"for and in the name of the said City, to do, perform, and discharge, all and singular, whatever acts and duties are or from time to time may become proper or necessary to be done by the said City in discharge of said trust. . . ." (§4 of the Act of June 30, 1869, App. B, *infra*, p. 114.)

It is this statute which is still the effective source of power for the management of Girard College. It is this statute which the Supreme Court of Pennsylvania in the instant case has sustained as authorizing the excluding of the Negro appellants from Girard College because of their race. It is this statute whose validity is here challenged.

The Mayor of the City and the President of City Council are designated by this statute as members of the Board. 53 PURD. STAT. §6481. The other twelve members are appointed by the Judges of the Courts of Common Pleas of Philadelphia County. 53 PURD. STAT. §6482.[4] The City Controller is required by law to audit the accounts of the College each year (Philadelphia Home Rule Charter, Section 6-400(c)), and the Board is required by law to report annually to the City Council, to the State Legislature and to the Courts of Common Pleas of Philadelphia. 53 PURD. STAT. §6484. And the City Treasurer is required by law to be the Treasurer of Girard College. 53 PURD STAT. §6483.

The Board serves without charge to the College and it enjoys a tax exemption equivalent to $555,700 per year (T. 474, 662).[5] When Girard College started on January

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[4] This method of appointment is the same as is used for the Board of Education which controls and operates the public school system in Philadelphia and the Board of Revision of Taxes which fixes the assessment for all real estate in Philadelphia for city and school taxes.

[5] "T" is used herein to designate the transcript of testimony in the Orphans' Court of Philadelphia County. The transcript of testimony is not a part of the printed record which was before the Supreme Court of Pennsylvania. However, the parties entered into a stipulation which was approved by the Supreme Court of Pennsylvania that the transcript was to be certified and filed in its entirety with that court and could be referred to by counsel in support of their argument. Pages referred to herein are a part of the record certified to this Court.

1, 1848, all of the $2,000,000 had been expended. By the stewardship of the City of Philadelphia, however, the estate of $2,000,000 in 1832 has grown to $98,000,000 in 1955, with an annual income of $2,211,000 (T. 480).

Girard College is today, and has been since its inception, an institution of the highest educational standards, devoted to the education and training of orphan boys. Located in the heart of Philadelphia in what is now a substantially Negro area, this publicly administered institution excludes Negroes.

II. THE CURRENT CONTROVERSY

(How the Federal Questions Are Presented)

In February, 1954, Negro appellants, Foust and Felder, applied for admission to Girard College. In March, 1954, the Board of Directors of City Trusts of the City of Philadelphia adopted a resolution rejecting them for admission. Each Negro appellant received a letter from the Secretary of the Board, on official stationery headed "The City of Philadelphia", setting forth the Board's resolution rejecting him. It has been conceded by the Board and by all the parties that the Negro appellants met all qualifications for admission, save race, and that the *refusal was based solely on the race* of the Negro appellants. *Girard Estate*, 4 D. & C. 2d 671, 672-3 (Phila. O.C., 1955).[6]

On September 24, 1954, the Negro appellants petitioned the Orphans' Court of Philadelphia County to order the Board of Directors of City Trusts to admit them, alleging, *inter alia*, that the Board's refusal violated the Fourteenth Amendment to the Federal Constitution (R. 62a, 72a).[7] The Mayor of the City of Philadelphia and the

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[6] See also R. 69a, 79a. It should be noted that under Girard's Will those who qualify are placed on an admission list and must be accepted for admission in order of application, within certain priorities dictated by the Will based upon the place of birth of the orphan.

[7] See supra, footnote 1.

Commission on Human Relations, a City agency, filed a separate petition joining in the request for relief sought by the Negro appellants, and also alleging that the Board's refusal violated the Fourteenth Amendment (R. 11a-12a). The Board of Directors of City Trusts filed an answer in which it admitted it was a City agency (R. 80-81a, 86a), but alleged that it could lawfully administer the College and implement the provision of the Girard Will limiting the admission to "poor white male orphans" by excluding Negroes.

Because of the provision of Girard's Will which would in certain circumstances give the property to the Commonwealth, and because of the Attorney General's authority, *parens patriae*, to represent the beneficiaries of all charitable gifts in Pennsylvania, the Attorney General of the Commonwealth of Pennsylvania was informed of the proceedings at the suggestion of the hearing judge. The Attorney General thereupon filed a petition for a citation likewise alleging that the present operation of Girard College by the City on a racially restricted basis violated the Fourteenth Amendment to the Federal Constitution, as well as the public policy of Pennsylvania, and that the Negro appellants should be admitted. (R. 116a-117a).

The hearing judge,[8] nevertheless, held that the City could exclude Negroes without violating the Fourteenth Amendment. Exceptions were then taken to the findings of fact, conclusions of law and the decree of the hearing judge, at which time the federal constitutional questions pre-

[8] The testimony before the hearing judge presented on behalf of appellants was devoted principally to demonstrating that a racially segregated school was injurious to the white student and not in harmony with the objectives of education in a democracy. The chief witnesses who testified on behalf of appellants were as follows: Isadore Chein (psychologist), Ira De A. Reid (sociologist), Alice V. Keliher (educator), Gilbert F. White (educator), E. Sculley Bradley (Professor of American Civilization and American Literature), George Schermer (specialist in inter-group relations), and Maurice B. Fagan (specialist in inter-group relations).

sented here as questions nos. 1, 2 and 3 (see Questions Presented, *supra*, p. 4) were squarely raised.[9] The Orphans' Court rejected these contentions, finding support in part in the decision of this Court in 1844 in *Vidal v. Girard's Executor*, 2 How. 127, upholding the validity of the Girard Trust.

The Supreme Court of Pennsylvania in an opinion filed on November 12, 1956, affirmed the decree of the Orphans' Court, with one justice dissenting. The majority opinion held that the City of Philadelphia in acting as trustee under the Will was performing a municipal function germane to its public purpose, but that even though a governmental body, it could nevertheless apply the racially discriminatory clauses of a will. The action of the City "as trustee" was held not governed by the constitutional limitations heretofore applied to all state action. The court gave no significance whatsoever to the many statutes and ordinances which the Commonwealth of Pennsylvania and the City of Philadelphia had enacted to carry out and implement Girard's wishes.

On appeal in the Supreme Court of Pennsylvania, ap-

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[9] The brief for the City of Philadelphia before the Orphans' Court in support of its exceptions presented, inter alia, the following questions (p. 1):

"1. Is the administration by the Board of Directors of City Trusts of a trust which requires discrimination because of race or color

(a) in violation of the Fourteenth Amendment of the Federal Constitution?

(b) contrary to public policy?

(Negatived by the hearing Judge.)

"4. Does the Act of June 30, 1869, P. L. 1276, creating the Board of Directors of City Trusts as a governmental agency violate the Fourteenth Amendment if it is construed to permit the Board to discriminate on the basis of race or color in the admission of students to Girard College?

(Negatived by the hearing Judge.)"

See also the brief for the Commonwealth of Pennsylvania in the Orphans' Court, pp. 1 (Question No. 4), 14-27, and the brief for Appellants Foust and Felder, pp. 1 (Questions No. 2 and 3), 9-32.

pellants again raised the federal constitutional questions which we now raise as questions nos. 1, 2 and 3. For example, the Commonwealth of Pennsylvania presented the following two questions in its brief (P. 1):

> "2. If exclusion of Negroes is required, is the administration by the Board of Directors of City Trusts acting on behalf of the City of Philadelphia, of Girard College as a segregated institution violative of the Fourteenth Amendment to the Federal Constitution?
>
> Answered in the negative by the Orphans' Court.
>
> "3. Does the Act of June 30, 1869, P. L. 1276, creating the Board of Directors of City Trusts violate the Fourteenth Amendment if it is construed to permit the Board to discriminate on the basis of race or color in the admission of students to Girard College?
>
> Answered in the negative by the Orphans' Court." [10]

Appellants Foust and Felder also presented in the Supreme Court of Pennsylvania the question of the constitutional effect of the action of the Pennsylvania courts in recognizing the "white" clause in the Girard Will as a defense for a suit for admission by otherwise qualified Negroes.[11]

The same federal constitutional issues were again raised in a timely petition for reargument filed on December 5, 1956. This petition was denied by the court below without opinion on December 20, 1956.

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[10] See also brief for the City of Philadelphia in the Supreme Court of Pennsylvania, pp. 1 (Question 1), 6-22, and the brief for appellants Foust and Felder, pp. 1 (Questions No. 2-4), 8-37.

[11] Brief for appellants Foust and Felder in the Supreme Court of Pennsylvania, pp. 37-39.

THE APPEAL PRESENTS SUBSTANTIAL FEDERAL QUESTIONS

1. The Supreme Court of Pennsylvania has sustained the constitutionality of a state statute pursuant to which an official city agency has excluded the Negro appellants solely because of their race. In reaching this result, the court below held that where a governmental body acts in a "fiduciary capacity", its actions are not limited by the Fourteenth Amendment. In so holding, the court below immunized an area of state action from the scope of the Fourteenth Amendment, so that states and their political subdivisions may, under the decision of the court below, act with impunity in segregating or discriminating on the basis of color so long as they can label their action "fiduciary".

In reaching its decision, moreover, the court below completely inverted this Court's decision in *Vidal v. Girard's Executors*, *2 How.* (U. S.) 125 (1844) (decided, it is to be recalled, 22 years before the Fourteenth Amendment and hence irrelevant as to issue of the constitutionality of the racial clause as applied by governmental officials). In that case, this Court sustained the Girard Will against an attack based on the contention that the City lacked power to act as trustee of the estate. This Court held that the trusteeship of an estate was within the functions of a municipal corporation, and that the City could serve as trustee only because this was a proper municipal function —and that the education of orphans was a proper municipal function. And the Supreme Court of Pennsylvana had held that the City of Philadelphia could be trustee under Girard's Will "only as it seems for public purposes, germane to its [the City's] objects." *Philadelphia v. Fox*, 64 Pa. 169, 181 (1870). Now the court below holds nonetheless that the City can discharge this appropriate municipal function without the limitation of the Fourteenth Amendment simply because it characterizes the state action as "fiduciary."

We submit that there is no warrant in logic or in law for the creation of this fiduciary exception to the Fourteenth Amendment. Certainly, the decision below is counter to this Court's plainly declared principle that "the Amendment makes void 'State action of every kind' which is inconsistent with the guaranties therein contained and extends to manifestations of 'State authority in the shape of law, customs or judicial or executive proceedings,'" *Shelley v. Kraemer*, 334 U. S. 1, 14-15, and to the numerous decisions of this Court and of lower courts which have applied this principle:

Court enforcement of racial restrictive covenant by an award of damages.

Barrow v. Jackson, 346 U. S. 249.

Enforcement of private contracts under the Railway Mediation Act.

Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210.

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192.

Racial restrictions on voting by a private political club.

Terry v. Adams, 345 U. S. 461.

Restrictions by a private company town.

Marsh v. Alabama, 326 U. S. 501.

City and State acting as landlord in housing projects.

Banks v. Housing Authority, 120 Cal. App. 2d 1 (1953), *cert. denied*, 347 U. S. 974.

Rudder v. United States, 226 F. 2d 51 (C. A. D. C. 1955).

State operation of swimming pool in proprietary capacity.

Baltimore City v. Dawson, 350 U. S. 877.

Lawrence v. Hancock, 76 F. Supp. 1004 (S. D. W. Va. 1948).

State seeking to lease recreation area to private organization.

Department of Conservation v. Tate, 231 F. 2d 615 (4th, 1956), *cert. denied*, 352 U. S. 838.

The decision below is also in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Valle v. Stengel*, 176 F. 2d 697 (3d. 1949), which held that the Fourteenth Amendment was violated when a local police chief ordered off the premises of a private park Negroes who had been refused admission to the swimming pool pursuant to the regulation of the private swimming pool owner.

The case at bar presents "state action" in its most elementary and clearest sense. The challenged statute declares the Board of Directors of City Trust to be a branch of the government of the City of Philadelphia acting "for and in the name of the City [of Philadelphia]". (Section 4 of the Act of June 30, 1869, 53 Purd. Stat. §6484). The letters of rejection bore the letterhead "City of Philadelphia." The members of the Board are City "agents or officers" (§6 of the Act of June 30, 1869, 53 Purd. Stat. §6486). The Board's attorneys describe themselves as attorneys for the City of Philadelphia. In every sense of the word, it is municipal or state power which is being exercised by the Board of Directors of City Trusts when it administers Girard College and when it rejects Negroes from that College on the basis of their race. Indeed, it could not be otherwise, for a municipal corporation can exercise only state power in the performance of its functions. As this Court said in *Home Telephone and Telegraph Company v. Los Angeles*, 227 U. S. 278, at pp. 286-287:

> ". . . the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the states, but also to every person, whether natural or juridical, who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a state power, in whatever form exerted."

True, it is that the activities of a municipal corporation have been sometimes categorized as "governmental" or "proprietary" for purposes of sovereign immunity con-

cepts and other problems of local municipal law. But both of these categories, comprising until the instant decision the totality of a municipal corporation's activities, have been held to be state action within the meaning of the Fourteenth Amendment. *Baltimore City v. Dawson*, 350 U. S. 877; *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D. W.Va. 1948).

The court below created a third category of municipal functions, namely "fiduciary", which it held to be beyond the ambit of the Fourteenth Amendment. It is submitted, that there is no warrant for this novel doctrine in the body of law formulated by this Court interpreting the Fourteenth Amendment.[12] Indeed, the fallacy of this conclusion is revealed by the fact that all city agencies and officers are "fiduciaries", who act in a "fiduciary" capacity. There is no "fiduciary" duty higher than that of a public official performing a public trust.

This Court has held that constitutional limitations on governmental officials with respect to race are applicable so long as the officials in question merely act for and in the name of the state. *Civil Rights Cases*, 109 U. S. 3, 17; *Shelley v. Kraemer*, 334 U. S. 1; *Wieman v. Updegraff*, 344 U. S. 183, 192; *United Public Workers v. Mitchell*, 330 U. S. 75; see also *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D. W.Va. 1948). It does not matter if the state official acts to carry out a racial discriminatory policy found in a state statute, *Brown v. Board of Education*,

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[12] Where the problem of the power of municipal corporations to act as trustee has been considered by other state courts, the decisions have generally been contrary to the instant decision. See, e.g., *Bullard v. Town of Shirley*, 153 Mass. 559, 27 N. E. 766 (1891). (Judge, later Justice, Holmes held that a city could not serve as trustee of a bequest to support a Unitarian minister); *City of Maysville v. Kentucky*, 102 Ky. 263, 83 S. W. 403 (1897) (city cannot serve as trustee for a religious institution). *Woods v. Bell*, 195 S. W. 902 (Tex. 1917) (city could serve as trustee for park for colored children) is not contra since at the time of the decision (1917), separate but equal was accepted constitutional doctrine.

347 U. S. 483; a local ordinance, *Buchanan v. Warley*, 245 U. S. 60; a private contract, *Shelley v. Kraemer*, 334 U. S. 1, 13-14, or indeed his personal prejudice if he is performing duties conferred by state law, *Williams v. United States*, 341 U. S. 97, 100-102.

Indeed, this Court has found state action where private groups not cast in official trappings are actually the repositories of state power and has held the activities of such groups to be limited by the Fourteenth Amendment's equal protection clause. *Terry v. Adams*, supra; *Muir v. Louisville Park Theatrical Assn.*, 347 U. S. 971; *Steele v. Louisville & Nashville R. R. Co.*, supra. Here the Board of Directors of City Trusts is not a private group, but an official arm of the City of Philadelphia. *A fortiori*, the action of the Board is state action within the meaning of the Fourteenth Amendment.

But the court below held that city officials could act in the name of the City of Philadelphia pursuant to a state statute without regard to the prohibitions against racial discrimination contained in the Fourteenth Amendment so long as no publicly raised funds had been used to construct Girard College. There would seem to be no basis for carving out from the concept of state action those types of state activity which use what was initially private money. Indeed, the decisions of this Court and other courts indicate that the test is public control—not the source of the funds. See for example *Terry v. Adams*, supra; *Public Utilities Commission of the District of Columbia v. Pollak*, 343 U. S. 451 (1952); *Valle v. Stengel*, 176 F. 2d 697 (3d. 1949); see also *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936).

The court below, however, erroneously found support in this Court's decision in *Quick Bear v. Leupp*, 210 U. S. 50, for its position that governmental officials could apply racially discriminatory standards so long as only funds which originated in a private gift were used. In that case, an attack was made on a contract wherein the Secretary of the Interior made payments of "tribal funds" to a school

managed by a Catholic priest for the education of children of the Sioux Indian tribe. These tribal funds had their origin in a treaty wherein the Sioux Indians made large cessions of lands and other rights to the United States for which the latter agreed to furnish aid and assistance in the education of the Sioux children. The basis of the decision, as clearly shown by this Court's citation of *Roberts v. Bradfield*, 12 App. D. C. 475, and *Bradfield v. Roberts*, 175 U. S. 291, turned upon this Court's conclusion that since admission to the school there in question was not limited to any particular sect, it was not a sectarian school, even though managed by a Catholic priest. For the Secretary of Interior to administer the fund, therefore, though governmental action, was nevertheless permitted, since the school was non-sectarian. Moreover, it would deny the Indians freedom of religion if their own money could not be used to educate their children in schools of their choice. The decision in *Quick Bear* is therefore in no way determinative of the case at bar.

As we have shown, it is the full power of the state which is responsible for exclusion from the institution of Negroes solely because of their race. In a very real sense, the instant case presents the same type of state action as was present in *Shelley v. Kraemer*, 334 U. S. 1, and *Barrows v. Jackson*, 346 U. S. 249. It is true that in those cases, this Court stated that the "[a]mendment erects no shield against merely private conduct, however discriminatory or wrongful." But, appellants do not here contend that the mere existence of the restrictive clause in Girard's Will violates the Fourteenth Amendment. They complain, as did the plaintiffs in *Shelley* and *Barrows*, and as this Court there held, that the enforcement of those restrictions by an official state agency was prohibited by the Fourteenth Amendment. "But here there was more. These are cases in which the purpose of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements." *Shelley v. Kraemer*, 334

U. S. 1, 13-14; *Barrows v. Jackson*, 346 U. S. 249, 253-4.

In Shelley, the official state agency was the state court which was attempting to enforce the covenant by injunction, and in the case of *Barrows* by damages. Here, it is city agents and officers attempting to enforce the restriction of Girard's Will by preventing the Negro applicants from attending Girard College.

Since these officials obtain their authority to act from the Act of June 30, 1869, P. L. 1276, a holding that they can exclude Negroes, pursuant to Girard's Will, clearly brings into question the constitutionality of the statute authorizing them to act. *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203. This Court there held:

> "The appellees press a motion to dismiss the appeal on several grounds, the first of which is that the judgment of the State Supreme Court does not draw in question the 'validity of a statute of any State' as required by 28 USCA §344(a). This contention rests on the admitted fact that the challenged program of religious instruction was not expressly authorized by statute. But the State Supreme Court has sustained the validity of the program on the ground that the Illinois statutes granted the board authority to establish such a program. This holding is sufficient to show that the validity of an Illinois statute was drawn in question within the meaning of 28 USCA §344(a). *Hamilton v. University of California*, 293 US 245, 258.". (p. 206)

2. The fact that the City of Philadelphia serves as trustee of the Will and administers Girard College would without more bring the administration of Girard College within the ambit of the Fourteenth Amendment. But this is only a small part of the state action present here. There are even greater indicia of state action. The numerous statutes enacted to authorize and direct the City of Philadelphia to carry out the trust, the numerous statutes en-

acted to change the law of Pennsylvania so certain provisions of Girard's Will with respect to guardianship and indentureship could be carried out, and the hundred and twenty-six years of city administration of the Will, constitute the type of state aid and help which makes the institution subject to the prohibitions of the Fourteenth Amendment. See, *e.g.*, *Public Utilities Commission of the District of Columbia v. Pollak*, supra; *Steele v. Louisville & Nashville R. Co.*, supra; *Brotherhood of Railway Trainmen v. Howard*, 343 U. S. 768. The fact that education of children, a vital state function,[13] is involved makes the state action even more apparent. *Cf. Terry v. Adams*, supra; see Note, *City's Operation of Schools under Discriminatory Will Does Not Violate Fourteenth Amendment*, 56 COLUM. L. REV. 285, 287 (1956); Fairman, *Mr. Justice Bradley*, at p. 91 in DUNHAM & KURLAND, MR. JUSTICE (1956).

Accordingly, this appeal also submits the substantial federal question whether the sum total of the activities of the Commonwealth of Pennsylvania in connection with Girard College amounts to state action to effectuate, aid and carry out the scheme which Girard established by his Will, including the racial restriction, so as to bring the administration of Girard College within the Fourteenth Amendment.

3. The observation by the court below that it might substitute a private trustee for the City of Philadelphia in the event that the City could not continue as trustee does not affect the substantial constitutional issues here submitted. In the first place, the court below based its dictum in substantial part on this Court's earlier opinions in *Girard v. City of Philadelphia*, 7 Wall. 1, 13; and *Vidal v. Girard's Executors*, *supra*. Of course, the issue as to the

[13] The basis for holding that the City of Philadelphia was legally capable of taking the bequest was that "the purposes of the trust [were] germane to the objects of the incorporation of the City of Philadelphia." *Vidal v. Girard's Executors*, 2 How. 127, 188 (U. S., 1844).

Fourteenth Amendment was neither raised nor decided in those cases and is not the law of the case. This Court merely held that there was *then* no ban to the City acting as trustee and added that in any event under well settled trust law, which is not here questioned, a trust will not fail for the want of a trustee.

Moreover, the decisive answer to any contention that such a substitution might remove the constitutional issues is at least twofold. First, the City of Philadelphia is still the trustee and it is still excluding Negroes. So long as the City serves as trustee of this College, appellants Foust and Felder and other poor, Negro orphan boys have a constitutional right to the education and training which Girard College provides. This argument that a substitution of trustee will remove the constitutional issue is no different from the contention made in the school segregation cases that the states could abolish their public school system.

Second, in any event, the change of trustees would not affect other equally serious constitutional issues in the case. As we have shown, the action of the Commonwealth of Pennsylvania and the City of Philadelphia in implementing and assuring that the provisions of the Girard Will were carried out went far beyond the mere holding of title as trustee by the City. See pp. 6-10, *supra*. This long history of extensive state and local governmental aid of itself amounted to state action within the meaning of the Fourteenth Amendment, and cannot simply be erased. Accordingly, even if this Court would sanction the substitution of the trustee by the lower court, there would still remain sufficient indicia of state action to preclude the exclusion of Negroes from Girard College solely because of their race.

4. The questions presented by the instant case and by the decision of the court below are substantial and important and do not represent an isolated decision of an inferior court, which, though in error, does not present that recurring type of situation which this Court will

review. This Court has, of course, always been solicitous of individual rights and particularly so in areas of racial discrimination and segregation.

Today, the sanctioning of any device, however innocently intentioned,[14] which exempts public officials from the limitations of the Fourteenth Amendment is a retrogression and will be used to support evasions of this Court's prohibitions against segregation. The existence of charitable trusts which are administered by governmental bodies is not uncommon. In fact, the Supreme Court of Pennsylvania stated that the City of Philadelphia administers at least eighty-nine other trusts.[15] And the present income and estate tax laws make gifts for charitable purposes to municipalities increasingly attractive.

The court below has carved out an area which removes public officials from the operation of the Constitution by the action of a private party. This is a novel doctrine which may be exploited to the detriment not only of racial minorities but of all citizens and should not be permitted to stand.

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[14] The Supreme Court of Pennsylvania treated appellants' arguments as an attack upon a will and the right of a testator to dispose of his property. It is clear from the briefs below that this was never a real issue. The sole question then as now is the right of the state, acting through one of its agencies, to discriminate upon the basis of race.

[15] A decision in this case will not affect any of these other trusts, since they do not have racial restrictive provisions.

CONCLUSION

The questions herein presented are substantial and of public importance.

Respectfully submitted,

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APPENDIX

Appendix A

OPINIONS AND JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA

In Re: ESTATE OF STEPHEN GIRARD, Deceased

Nos. 167, 168, 175, 176, 177, 178, 179, 180, 202, 203 January Term, 1956

(Reported at 386 Pa. 548)

OPINION BY MR. CHIEF JUSTICE HORACE STERN, November 12, 1956:

While it may seem unfortunate that the court is obliged to sanction the exclusion of any child from even a *private* school or orphange because of race, creed or color if otherwise entitled to admission, the Court is clearly of opinion that the unanimous decision of the Orphans' Court, supported by the learned and comprehensive opinions of Judge BOLGER and Judge LEFEVER, must be affirmed, it being clearly understood at the outset that the beneficiaries of the charity of Stephen Girard are not being determined by the State of Pennsylvania, nor by the City of Philadelphia, nor by this Court, but solely by Girard himself in the exercise of his undoubted right to dispose of his property by will, and, in so doing, to say, within the bounds of the law, who shall enjoy its benefits.

Stephen Girard, — merchant, mariner, banker and philanthropist, — died on December 26, 1831; his will,

dated February 16, 1830, and two codicils thereto, were probated at Philadelphia five days later. The will is, in many respects, a remarkable document; it was prepared with the aid of William J. Duane, distinguished leader of the bar in his day, and was the product of protracted consultations between them which extended over the course of some five or six weeks. Briefly summarized, it provided, after making a number of specific gifts to various institutions and individuals, for a devise and bequest of his entire residuary estate to "The Mayor, Aldermen and Citizens of Philadelphia"[1] their successors and assigns, in trust to erect a "college" on a square of ground between High and Chestnut Streets and 11th and 12th Streets, in the City of Philadelphia (by a codicil he changed this location to an estate he had purchased on "the Ridge Road in Penn Township."). He stated that "I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds". He provided for the selection of a competent number of instructors, teachers, assistants and other necessary agents, and that as many poor white male orphans. between the ages of six and ten years as the income should be adequate to maintain, should be admitted into the college, preference being given first to orphans born in the City of Philadelphia, secondly, to those born in any other part of Pennsylvania, thirdly, to those born in the City of New York, and lastly, to those born in the City of New Orleans. He provided that the orphans admitted into the college should be "there fed with plain but wholesome food, clothed with plain but decent apparel (no distinctive dress ever to be worn) and lodged in a plain but safe manner"; due regard

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[1] This was the corporate name of the city under the Act of March 11, 1789, 2 Sm. L. 462. The title was changed by the Consolidation Act of February 2, 1854, P. L. 21, to "The City of Philadelphia."

was to be paid to their health, and to that end they were to have suitable exercise and recreation, and he prescribed in detail the branches of education in which they should be instructed. He declared that "together with the object just adverted to [that is, the provision for the poor male white orphans], I have sincerely at heart the welfare of the City of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the River Delaware . . .", and accordingly, he bequeathed out of the residue the sum of $500,000 in trust to pave Delaware Avenue and Water Street and to make certain other improvements in that part of the city. After a bequest to the Commonwealth of Pennsylvania of $300,000 he left the remainder of his residuary estate in trust to apply the income to the further improvement and maintenance of the college, to enable the city to provide for a competent police force, and to improve the property and general appearance of the city. He stated that "To all which objects, the prosperity of the City, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year for ever—after providing for the College as hereinbefore directed, as my primary object." If the city should knowingly and wilfully violate any of the conditions in the will, the said remainder of the residue was given to the Commonwealth of Pennsylvania for the purposes of internal navigation, except that the income from his real estate in Philadelphia was to be forever applied to the maintenance of the college; if the Commonwealth failed to apply the bequest to the purposes mentioned, the said remainder was given to the United States of America for the purposes of internal navigation. There was a provision in the will that the city should keep separate accounts of the trust funds, which were not to be used for any but the prescribed purposes, and should furnish an annual account thereof to the legislature.

Because of the financial panic of 1837 and the consequent shrinkage of the assets of the estate there was

some delay in the construction of the buildings and the college was not opened until January 1, 1848. Since that time, a period now of over a hundred years, it has been conducted in conformity with the purposes expressed in Girard's will. As is not altogether unusual in such cases, some of his heirs were disappointed at the disposition he made of his wealth, and accordingly they indulged in a number of attacks upon the validity of the will, the first of which resulted in the famous argument in the Supreme Court of the United States in 1844 between Daniel Webster on the one side and Horace Binney on the other. Two main questions were there involved, one, whether the city had the legal power to accept the trust confided to it, and the other, whether the trust in regard to the college was rendered invalid by a provision in the will that no ecclesiastic, missionary or minister of any sect whatsoever, should ever hold or exercise any station or duty whatever in the college, nor be admitted there for any purpose. (Girard carefully explained in his will that he made this provision because, there being a multitude of sects, he did not wish to expose the orphan children to any doctrinal or sectarian controversies.) The legislature, by Acts of March 24, 1832, P. L. 176, and April 4, 1832, P. L. 275, had provided the necessary legislation for the improvement by the city of Delaware Avenue and Water Street, and had provided further that it should be lawful for the city to enact all such ordinances and do all such acts as might be necessary and convenient for the full and entire acceptance and execution of all the bequests, trusts and provisions in Girard's will, and for the appointment of such agents as might be deemed essential to the execution of the trusts.[2] The Supreme Court held in *Vidal et al. v. Stephen Girard's Executors*, 43 U. S. (2 Howard) 127, in an elaborate opinion by Mr. Justice STORY, that the city was legally capable of taking

[2] Similar legislation, in aid of certain provisions of the will, were enacted by the Acts of February 27, 1847, P. L. 178, and April 20, 1853, P. L. 623.

the bequest of the estate for the erection and support of the college upon the trusts designated in the will, and that these were valid charitable trusts and capable of being carried into legal effect.

In *Girard v. Philadelphia*, 74 U. S. (7 Wallace) 1, the decision in the *Vidal* case was affirmed, and it was held that the Consolidation Act had not changed the identity of the city so as to affect in any way its administration of the trust. The Court stated (as will be referred to again hereafter): "Now, if this were true [that the city had become unable to administer the trust] the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee." In *The City of Philadelphia v. The Heirs of Stephen Girard*, 45 Pa. 9, our own Court likewise held that the trusts created in the will were valid, and pointed out that the distinction must carefully be observed between the purposes and provisions of the trust itself and any problems or difficulties arising from the mode of its administration, the former not being affected by the latter; attention was called to the important fact that Girard stated that it was his "primary object" to construct and maintain the college. In *Philadelphia v. Fox*, 64 Pa. 169, it was once again held that Philadelphia could act as a trustee to carry out the trusts under Girard's will, and that the Act of June 30, 1869, P. L. 1276, providing for the administration by a Board of Directors of City Trusts of the trusts confided to the city, the Board being "dissociated from the general government of the city," was a valid enactment. And finally, in *Girard's Appeal*, 4 Pennypacker 347, dealing with another attack on the will by Girard's heirs, it was held that they were concluded by the decree of the United States Supreme Court in the *Vidal* case, and that the establishment of the Board of Directors of City Trusts was legal and proper. All these onslaughts in both the Courts of Pennsylvania and of the United States left the Girard charity, as was said by the Court in *Benjamin Franklin's Administratrix*

v. The City of Philadelphia, 2 Dist. Rep. 435, 437, as "fixed, firm, and immovable as a rock."

Coming now to the particular issue involved in the present case, it arises from the provision in the will which limits the admission into the institution to applicants possessing five qualifications:—they must be poor, they must be white, they must be male, they must be orphans (which has been construed to mean *fatherless* children), and their ages must be between six and ten; there are also preferences prescribed in regard to the birthplaces of the applicants. It is contended that the Fourteenth Amendment has made the restriction to white children unconstitutional. The city, the Commonwealth, and two negro applicants for admission to the institution, have filed petitions for a citation on the Board of Directors of City Trusts to show cause why these applicants should not be admitted. The court affirmed the Board's refusal of the applications for admission and dismissed the petitions for a citation.

Subject, of course, to compliance with all applicable laws, it is one of our most fundamental legal principles that an individual has the right to dispose of his own property by gift or will as he sees fit; indeed this right is so much protected that a testator's directions may be enforced even though contrary to the general view of society (see, for example, *Higbee Will*, 365 Pa. 381, 75 A. 2d 599), and however arbitrary, unwise, intolerant, discriminatory, or ignoble his exercise of that right may be. He is entitled to his idiosyncracies and even to his prejudices. It was said in *Brown v. Hummel*, 6 Pa. 86, 94, 95: "It is the principle and not the individual instance that is to be considered. What private charity will next be disturbed and invaded? The will of Stephen Girard offers a conspicuous mark. . . . The most solemn act of a man's life, which is consummated by his death, is his last will and testament. By that act he makes a law for the disposition of his own property, acquired by his own industry, which, if it does not contradict the law of the country, has hitherto been considered

inviolate. Shall it be so considered no longer in Pennsylvania?" Equally cogent language is to be found in many other cases in this Court, for example, in *Ervine's Appeal*, 16 Pa. 256, 265, and again in *Cauffman v. Long*, 82 Pa. 72, 77, 78, where it is said: "No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of it. . . . In many instances testamentary dispositions of property seem harsh, if not unjust, . . . It is doubtless true that narrow prejudice sometimes interferes with the wisdom of such arrangements. This is due to the imperfections of our human nature. It must be remembered that in this country a man's prejudices are a part of his liberty . . . he is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law." In *Dulles's Estate*, 218 Pa. 162, 163, 67 A. 49, it was said: "The fundamental law of Pennsylvania in regard to property, which ought not to require restatement as often as it does, is that the owner may do as he pleases with it provided the disposition be not to unlawful purposes, and what he may do himself he may do by agent while living, or by executor after death." In *McCowan v. Fraser*, 327 Pa. 561, 564, 192 A. 674, 676, it was said: "The right to dispose of property is an incident of ownership, and a gift is none the less valid because it is undeserved or improvident." In *Wetzel v. Edwards*, 340 Pa. 121, 128, 16 A. 2d 441, 444, it was said: "No right of a citizen is more valued than the power to dispose of his property by will." In *Johnson Will*, 370 Pa. 125, 127, 128, 87 A. 2d 188, 190, it was said: "But it is and always has been the law of Pennsylvania that every individual may leave his property by will to any person, or to any charity, or for any lawful purpose he desires, . . . While it is difficult for many people to understand how or why a man is permitted to make a strange or unusual or an eccentric bequest, . . . we must remem-

ber that under the law of Pennsylvania 'a man's prejudices are a part of his liberty. He has a right to the control of his property while living and may bestow it as he sees fit at his death".

Stephen Girard naturally must have realized that he could not create an institution large enough to furnish both sustenance and education to any and all the children of Philadelphia, Pennsylvania, New York and New Orleans who might desire to be admitted; he could provide for only a small minority of such children and accordingly he prescribed a method of selection as he had both a legal and moral right to do unless there were involved a violation of some affirmative provision of law. Admittedly there are provisions in the will which represent Girard's individual views regarding the education and rearing of the children the wisdom of which might be subject to differences of opinion, but, even if those provisions be considered peculiar, Girard was entitled to prescribe them for the operation of the institution which he was founding.

The question then, is whether the limitation in Girard's will to white children as the beneficiaries of his college or orphanage, although undoubtedly lawful at the time of the execution of his will and of his death, has become invalid as a result of the adoption of the Fourteenth Amendment, which prohibited any State from denying to any person within its jurisdiction the equal protection of the laws. No such question could possibly arise in the case of a private charitable trust for the Fourteenth Amendment applies only to agencies of the State or of a municipality within the State; it is directed solely against State, not individual, action. It was said in the *Civil Rights Cases*, 109 U. S. 3, 17: "In this connection it is proper to state the civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." In *Corrigan v. Buckley*, 271 U. S. 328, 330, it was said: "And

the prohibitions of the Fourteenth Amendment 'have reference to state action exclusively, and not to any action of private individuals.' . . . 'It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.' . . . It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; . . . ." In *Shelley v. Kraemer*, 334 U. S. 1, 13, it was said: "Since the decision of this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." And in *Rice v. Sioux City Cemetery*, 349 U. S. 70, 72, it was said: "The basis for petitioner's resort to this Court was primarily the Fourteenth Amendment, through the Due Process and Equal Protection Clauses. Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked." And while it would no doubt constitute "State action" for a court to enforce a restriction or discrimination invalid under the Fourteenth Amendment, the restrictive provisions themselves, as was said in *Shelly v. Kraemer*, supra (p. 13), "cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those [provisions] are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." It is perfectly clear, therefore, that private trusts for charitable purposes, not being subject to or controlled by "State action," are wholly beyond the orbit of the Fourteenth Amendment. Such trusts abound in overwhelming numbers and there can be no question as to their

legality however limited be the class of their beneficiaries or whatever be the nature or basis of their restrictions; charitable trusts for limited groups, whether racial or religious, are as valid as if for all the people of the world. We have charitable trusts for ministers of various church denominations, for foreign missions, for churches, priests, Catholics, Protestants, Jews, whites, Negroes, for relief of the Indians, for widows or orphan children of Masons or other fraternities, for sectarian old folks homes, orphanages, and so on. Certainly no one would contend that a donor or a testator could not establish a charity, the beneficiaries of which were to be those whom he designated,—persons of any prescribed race, creed or color, or however otherwise differentiated. The court is concerned only with the legal right of such selection by a donor or testator and not with whatever illiberalism he may display in his exercise of the right.[3]

The question here involved finally narrows down, then, to the contention of the petitioners that the trust for the orphanage or college created in Girard's will is not a *private* trust, but that it comes under the principle of "State action" within the compass of the Fourteenth Amendment because of the fact that it is the City of Philadelphia which is the trustee appointed by Girard and which has ever since administered the trust. In considering the question thus raised it must be immediately borne in mind that we are not dealing here with a racial discrimination created by a *city ordinance* as in *Buchanan v. Warley*, 245 U. S. 60, or *Harmon v. Tyler*, 273 U. S. 668, or *Richmond v. Deans*, 281 U. S. 704, but by a private individual dis-

[3] The fact that a charity is restricted in its beneficiaries to a specific religious group does not make it any the less a "purely public charity" entitling it to tax exemption under the laws of the Commonwealth: *The Burd Orphan Asylum v. The School District of Upper Darby*, 90 Pa. 21. This question, however, is not involved in the present case; the Girard College has been properly exempt from taxation since its creation.

posing of his own property. It is true that Girard appointed the City of Philadelphia as the trustee to administer the trust according to the terms of his will, but he certainly did not intend thereby to empower it to conduct such administration in its *public or governmental capacity*, or to bring into play any of its *proprietary* rights since it is merely the title holder of Girard's property and not its beneficial owner. As a *trustee* it was to act and could act only in a *fiduciary* capacity, exercising no State or governmental function or power in the slightest degree, but being limited to the same rights, powers and duties, no more and no less, as those of any private individual or trust company acting as trustee. If it were to be held that the city was acting in a public or governmental capacity instead of merely as a fiduciary, and therefore was engaged in "State action," it could legislate; it could change the plans, structure and terms of the entire will; it could provide for co-education instead of the beneficiaries being limited to males; it could prescribe a different age limit instead of the children being confined to those between six and ten years of age; it could provide that not only orphans but *all* children should enjoy the benefit of the charity; it could, in short, assume to exercise the same complete, unrestricted control over the college as if it were a *public* institution. In fact the college is solely responsible for its own policies and management. Its employes are not employes of the city but of the trust estate. All provisions of the will show that it was not intended to be a public school; indeed, it is not merely a school at all but what Girard himself called in a codicil to his will, an "Orphan Establishment," a home where the fatherless boys eat, sleep, study and live together, enjoying the testator's bounty which provides for them not only an education but also lodging, board, clothing and all the necessities of life. The situation, therefore, is not to be confused with the so-called de-segregation cases which dealt with public schools where no discrimination in respect to race, creed or color, as the United States Supreme Court has decided, is

permissible under the Fourteenth Amendment. Girard College is a comparatively large institution, but no different legal principles apply to it for that reason than to the smallest of private schools. It is erected on land owned by Girard and the buildings were constructed with his own funds (*cf. Reuben Quick Bear v. Leupp, Commissioner of Indian Affairs*, 210 U. S. 50, where the Commissioner was allowed to contract with a sectarian mission for the education of Indian pupils supported by trust funds belonging to their own tribe.) The college has been supported and maintained for now over a century by Girard's estate; not a penny of State or city money has ever gone into it;[4] no taxpayer has ever been called upon to contribute to it; true, it is exempt from local taxation, but so are all other charities even though restricted as to their beneficiaries and managed by private trustees. It is contended that, because Girard's will provided that the funds of the trust should be held and invested by the city treasurer and that an annual financial accounting should be presented to the legislature, this pointed to a public institution, but this argument loses sight of the fact that the will provided that none of the monies of the trust were at any time to apply to any other purposes than those prescribed by the testator and that separate accounts distinct from any other accounts of the ctiy should be kept by it; it must also be remembered that the city in its own right was a secondary beneficiary of part of Girard's residuary estate, so that it had an independent interest of its own to protect, wholly apart from its status as fiduciary. Petitioners point out that two of the provisions of Girard's will have in fact been disregarded by the courts, the one, that no part of his real estate in Pennsylvania should ever be sold but should be rented

[4] In *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212, the library there involved was given by the donor to the city, which owns and almost entirely maintains it on city-owned land; it is now the public library of Baltimore. Moreover no violation of any provision of the donor was involved in that case.

out from time to time on leases not exceeding five years. It is true that there were some sales made under the authority of the Orphans' Court but only because the income of the trust had shrunk to a point where the college could not be efficiently maintained and therefore the sales were the only recourse open in order to preserve the purposes of the trust; this was purely an administrative matter, sanctioned by law, and involving no change or violation whatever of any of the substantive provisions or objects of the trust, and the same is true of the authority given by the court to execute leases for fifteen years of certain mine properties, it having been found impossible to secure good tenants on shorter term leases.

By the Act of June 30, 1869, P. L. 1276, the administration of all charitable trusts confided to the City of Philadelphia was thenceforth to be in the charge of a board composed of fifteen persons, including the mayor of the city, the presidents of the councils, and twelve other citizens appointed by certain judges—now by the judges of the Court of Common Pleas of the County of Philadelphia. From that time on the Girard trust estate, as well as all the other charitable trusts of which the city is the trustee, has been managed exclusively by this Board. The Act was upheld as to its validity in *Philadelphia v. Fox*, 64 Pa. 169, where the policy it represented was described (p. 183) as "having such a board dissociated from the general government of the city". Thus, the administration of the city's fiduciary duties was completely divorced from that of its ordinary governmental functions. That the framers of the Philadelphia Home Rule Charter and all the people of the city who by their vote adopted it in 1951 so understood this separation of the Board of Directors of City Trusts from any connection with the governmental powers of the city is shown by the fact that the Charter provides, section A-100, that it should "not apply to the Board of Directors of City Trusts and to any institutions operated by it," the annotation thereto of the Charter Commission being

that "The Board of City Trusts is generally not dealt with by the Charter *to protect its special status as a trustee.*" In other words, the Charter, which is comprehensive and all-embracing in its provisions for the government of the City of Philadelphia, expressly excludes the Board of Directors of City Trusts as a part or arm of that government and completely dissociates it in line with the statement in the *Philadelphia v. Fox* case above quoted.[5] The treasurer of the city serves as treasurer of the board and the mayor and president of city council were made members of the Board obviously because, as hereinbefore stated, the city itself, as a secondary beneficiary of the trust estate, has an interest in the management and protection of its funds; the Board must account, not to the city government, but to the Orphans' Court for the performance of its duties as trustee, the same as any other trustee (*Wilson, Mayor v. Board of Directors of City Trusts*, 324 Pa. 545, 188 A. 588). It is of interest to note that if the city itelf had considered the Board to be an agency of its public government and subject to its control it could, and no doubt would, have exercised its resulting authority by directing the Board to admit these applicants to the college, instead of which, recognizing that it was merely a fiduciary, it petitioned the Orphans' Court for that purpose. And it is further to be observed, in that same connection, that the Board filed an Answer to the city's Petition, thus evidencing the complete severance between the city in its ordinary municipal or governmental capacity and the Board of Directors of City Trusts administering the trusts confided to the city as trustee.

The City of Philadelphia has been appointed at various times during a period of over two hundred years as trustee of many charitable trusts in addition to that created

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[5] Likewise the Act of June 25, 1919, P. L. 581, to provide for the better government of the City of Philadelphia, did not include the Board of City Trusts as a part of the city's governmental structure.

by Stephen Girard; they are said to number 89 in all at this time, and it is wholly impossible to conceive that the donors and testators had the slightest idea in appointing the city as a trustee of their charitable trusts that it could ever be contended that they were thereby subjecting their trusts to the governmental powers of the city and to the danger of their trusts being thereby invalidated or impaired which would not have been the case had they appointed a trust company or an individual as trustee. It would seem entirely clear, viewed from any and all angles, that the administration of the Girard trust by the Board of Directors of City Trusts does not in the slightest degree represent "State action" which would bring the present situation within the ambit of the Fourteenth Amendment.

But finally, even if the Board of Directors of City Trusts *were* deemed to be engaged in "State action" in the administration of the Girard trust, petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by the inhibition imposed upon it by the Fourteenth Amendment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee. It is hornbook law, pronounced over and over again by the decisions of this court and presumably by those of all other jurisdictions, that, as stated in *Girard v. Philadelphia*, 74 U. S. (7 Wallace) 1, 13: "Now, if this were true [that the city could not act as trustee] the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee." Already in the first attack on the trust the Supreme Court in *Vidal et al. v. Stephen Girard's Executors*, 43 U. S. (2 Howard) 127, 188, had said: "It is true that, if the trust be repugnant to, or inconsistent with the

proper purposes for which the corporation [here the City of Philadelphia] was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust." The incompetency of a trustee does not destroy the trust nor affect its validity or enforceability. No bequest or devise for a charitable use is void or in any manner impaired because given to a person or corporation incapable, for any reason, of acting as trustee or carrying out its terms; in such a case it is for the court to appoint a trustee to administer its provisions: *Frazier, Trustee v. St. Luke's Church*, 147 Pa. 256, 23 A. 442. It was stated in the opinion in that case (p. 260, A. p. 442) that the 10th section of the Act of April 26, 1855, P. L. 331, that "no disposition of property he after made for any religious, charitable, literary or scientific use, shall fail for want of a trustee, . . . but it shall be the duty of the orphans' court, or court having equity jurisdiction in the proper county, to supply a trustee, . . ." was "merely declaratory of the law as it had existed and been enforced by the courts of chancery in England for hundreds of years." In *Toner's Estate*, 260 Pa. 49, 54, 55, 103 A. 541, 543, it was said: "It is a cardinal maxim in the courts of chancery, upon this subject, that a trust will not fail for want of a [faithful] trustee," citing many cases. In *Abel, Trustees v. Girard Trust Company, Trustee*, 365 Pa. 34, 40, 41, 73 A. 2d 682, 685, it was said: "It is unnecessary to consider whether the Association, chartered under the Act of 1874, April 29, P. L. 73, 15 PS 1 et seq., had the power and authority to act as trustee of a charitable trust. The familiar rule is that a charitable trust will not fall for want of a trustee," citing many authorities.

Realizing, as they must, that their attempt to establish that the City of Philadelphia cannot, by reason of the Fourteenth Amendment, continue to carry out the provi-

sions of the Girard will in reference to the prescribed beneficiaries of the trust would, even if successful, be a Pyrrhic victory because it could result only in another trustee being appointed for that purpose, petitioners argue that the limitation of the beneficiaries of the "Orphan Establishment" to white orphan children was a relatively unimportant matter in Girard's mind, and that his "dominant" purpose was that the City of Phliadelphia should be the trustee. Not only is this, at best, mere speculation, but the most casual consideration of the terms of the will shows that the exact opposite is the truth. Who can tell better than Girard himself what his "dominant" purpose was? In his will he said, "I am *particularly desirous* to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds". And he further said, after speaking of his devotion of the fund to the prosperity of the city, that this was to take place only "after providing for the College as hereinbefore directed, *as my primary object.*" His *secondary* objects, as he stated them, were the improvement of the city's police force, the property and general appearance of the city, and the diminuation of the burden of taxation. He provided that even if the city should violate any of the conditions of the will the income from his real estate in the City of Philadelphia was nevertheless to be forever applied to maintain the college. His voice therefore, on this point, speaks from the grave. Indeed, if speculation were to be indulged in, it is obvious that he wished the institution he was creating to be perpetual,—in fact he says so,—and that therefore he required a perpetual trustee, but at that time there were no trust companies, such as those with which we are now so familiar, existing in Philadelphia.[6] Accordingly, if he wanted, as he un-

[6] James G. Smith, in his book on "Trust Companies in the United States," speaks (p. 233) of the age-long "search for a continuous trustee."

doubtedly did, to obtain an immortal trustee, he had no other resource but to choose the City of Philadelphia. Incidentally, appellants have apparently not been able to find any case—they have cited none—where the identity of the named trustee was held to be more important than that of the beneficiaries of the trust as provided in the deed or will.

Petitioners make much in their argument of the proposition that the doctrine of cy pres ought to be applied in this case by omitting the word "white" in the will. As previously stated, they belittle the importance in Girard's mind of this provision, claiming that the only reason for it was that at the time he executed his will negroes were slaves and therefore it never occurred to him that they could or should be admitted into such an orphanage or educational institution. However, slavery had been abolished in Pennsylvania by the Act of March 1, 1780, 1 Sm. L. 492, and there were said to be at that time 15,000 negroes in Philadelphia who were free, not slaves. There is no need whatever in the present case for the application of the doctrine of cy pres, because that doctrine applies only if it has become impossible or impracticable to carry out the objects of a trust; here there is no such situation for the trust can be enforced according to its literal terms as it has been for well over a hundred years. To continue to execute it in compliance with the exact directions of Girard's will has not become either impossible or impractical, nor, as has been pointed out, illegal. There is no shortage of poor white male orphans between the ages of six and ten; on the contrary there are more qualified applicants than can be accommodated. To sanction a change of the express terms of the will of Stephen Girard, in which he exercised his inalienable right to declare who the beneficiaries of his charity were to be, would, in the opinion of the court, be a wholly unwarranted and improper decision, unjustified by any principle of applicable law.

Decrees affirmed, each of the parties to bear his or its own costs.

CONCURRING OPINION BY MR. JUSTICE BELL:

Stephen Girard left (most of) his enormous estate to establish a perpetual orphan home and college for "poor white male orphans". I fully agree with everything that Chief Justice STERN has said in his exceptionally able opinion. However, since appellants, in order to convert a private charitable orphanage establishment into a publicly owned and publicly sustained public school, i.e., "a segregation case", have distorted the plain language and the clear meaning of Girard's will, as well as the principles and legal effect of numerous authorities, I deem it wise to further analyze and to refute more comprehensively and in greater detail their conjectural, as well as their plausible, but unsound contentions.

The two principal and very important questions raised by the record and the six voluminous briefs filed in this appeal are: What was Girard's dominant intent and can it be lawfully carried out?

Two young colored male orphans, between the ages of six and ten years, sought admission to Girard College. There are approximately 1137 poor white male orphans housed, fed, clothed, maintained, instructed and reared each year in Girard College and the number of such applicants always has exceeded the capacity of the College. The Orphans' Court of Philadelphia County in two very able opinions, one by Judge BOLGER and the other by Judge LEFEVER, dismissed the applications because the admission of these boys was not authorized under Girard's will.

GIRARD'S WILL

The will of Stephen Girard, dated February 16, 1830, has become a national landmark in the history of Trusts, and Girard College, which was the heart and soul of his thirty-two page will, has became an admired institution throughout our Country.

Stephen Girard prepared his will with the utmost

care. He was an exceptionally able, intelligent man, and he had the advice of one of the leading lawyers of his time. The evidence shows that they shut themselves in a room and discussed the proposed will and its contents for five weeks. In his will Girard specified in lengthy and minute detail how he wished the College to be built and maintained, and the purpose to which it was to be devoted. He said as clearly as the English language will permit that this was to be a College and a Home for "poor white male orphans" who were to be admitted between the ages of six and ten and remain until they respectively arrive at between fourteen and eighteen years of age. He prescribed their food, their dress, their educators, their instruction in various branches of educations, their seclusion and restraint from the rest of the world, as well as from their parents, clergymen and priests, and he specifically said that the provisions for the College were "my primary object".

If any language is clear and plain and unmistakable as to who should be admitted to the College, Girard's language is clear and plain and unmistakable. He was creating an "orphanage establishment", a home and college not for poor girls and boys, not for orphans, boys, not for red or brown or yellow or black orphans; not even for all orphans —he created in the clearest imaginable language an orphan home and college for "poor white male orphans".

Girard first made a gift to the Pennsylvania Hospital of $30,000 to pay to his "black" woman, Hannah, to whom by his will he gave her freedom, the sum of $200 a year, and the balance to be used for the sick in the Hospital. He then gave the sum of $20,000 to the Pennsylvania Institution for the Deaf and Dumb for the use of that Institution. He then gave $10,000 to The Orphan Asylum of Philadelphia for the use of that Institution. He did not limit these gifts to white people. He then gave $10,000 to the Comptrollers of the Public Schools for the City and County of Philadelphia for the use of the schools upon the Lan-

caster system. He then bequeathed to the Mayor, Aldermen and Citizens of Philadelphia the sum of $10,000 to distribute the income among poor white housekeepers and roomkeepers of good character residing in the City of Philadelphia. He then gave $10,000 to the Society for the relief of poor and distressed masters of ships, their widows and children. He then gave $20,000 to the Masonic Loan in trust for the Grand Lodge of Pennsylvania. He then gave $6,000 for the purchase of land, one part thereof for poor white male children and the other part for poor white female children of Passyunk Township. He then made very small pecuniary gifts and devises to members of his family and friends. He then made a gift to his captains and to those who were bound to him by indenture as apprentices or servants. He then devised one-third of his real and personal estate near Washita in the State of Louisiana to the Corporation of the City of New Orleans, for such uses and purposes as the Corporation may consider most likely to promote the health and general prosperity of the *inhabitants* of the City of New Orleans.

In Paragraph XX he said: "And whereas I have been for a long time impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance they are exposed; and *I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution,** a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds: And whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that

* Italics throughout, ours.

the eastern part of the city may be made to correspond better with the interior: Now, I do give devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind and wheresoever situate (the real estate in Pennsylvania charged as aforesaid) unto 'The Mayor, Aldermen and citizens of Philadelphia their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned. . . .'"

He provided in the remainder of Paragraph XX that the rents, issues and profits should be used to keep that part of the City constantly in good repair.

We then come to the most pertinent provision of the will, Paragraph XXI. In this paragraph testator gave $2,000,000 of the residue of his personal estate "in trust . . . [to erect] as soon as practicably may be, in the centre of my square of ground between High and Chestnut streets and Eleventh and Twelfth streets,* in the city of Philadelphia (which square of ground I hereby devote for the purposes *hereinafter stated, and for no other*, forever) a permanent College, with suitable out-buildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established; . . .". He provided in very minute detail (through seven pages) the design, the material and the manner in which the buildings were to be erected. When the college and apurtenances shall have been constructed and properly furnished, he directed that the balance of $2,000,000, and subsequently the remainder of his residuary personal estate shall be applied to maintain the said college according to his directions. "3.** *As many poor white male orphans, between the ages of six and ten years*, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible; and

* By his codicil dated June 20, 1831, he changed the situs of his "Orphan Establishment" to its present location.

** 1 and 2 dealt with instructors.

from time to time as there may be vacancies, or as increased ability from income may warrant, others shall be introduced."

In Paragraph XXII of his will Girard gave $500,000 for the repair and improvement of the streets of Philadelphia fronting on the River Delaware and of certain buildings therein, and for the widening and paving of Water Street.

In Paragraph XXIII of his will he gave to the Commonwealth of Pennsylvania $300,000 for internal improvement by canal navigation.

In Paragraph XXIV of his will Girard provided that the remainder of his residuary personal estate shall be applied:

"1. To the further improvement and maintenance of the aforesaid College as, directed in the last paragraph of the XXIst clause of this will.

"2. To enable the Corporation of the City of Philadelphia to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, ...

"3. To enable the said corporation to improve the city property, and the general appearance of the city itself; and, in effect to diminish the burden of taxation, now most oppressive especially on those, who are the least able to bear it. . . .

"To all which objects, the prosperity of the City, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year for ever—*after providing for the College as hereinbefore directed, as my primary object.*"

Girard then provided that if the City knowingly and wilfully violated any of his testamentary conditions, he bequeathed the said remainder to the Commonwealth of Pennsylvania for the purpose of internal navigation

"*excepting, however*, the rents issues and profits of my real estate in the City and County of Philadelphia, *which shall forever be reserved and applied to maintain the aforesaid College*, in the manner specified in the last paragraph of the XXIst clause of this will".

Testator then provided that if the Commonwealth failed to apply his bequests to the uses and purposes he mentioned, he devised the remainder to the United States of America for the purpose of internal navigation and no other—"the rents aforesaid *always excepted and reserved for the College* as aforesaid." First and foremost was always the College!

It is impossible for any unbiased person to read Girard's will without being convinced that *his specific, as well as his primary and dominant and paramount intent*, was to provide a college and orphanage home for "poor white male orphans". Girard not only *specifically* said so twice in his residuary trust provisions or bequests, but in all gifts or provisions pertaining to his residuary estate, the College was placed above everything else as the primary object of his heart and bounty. The language describing and defining the class of beneficiaries, namely, "poor white male orphans" is so clear, plain, certain, unambigous and unmistakable, that it seems incredible that it is now contended that "white" does not mean "white"—it means white and black and yellow and brown.

Before discussing the many cases which for a period of over 100 years have sustained Girard's testamentary orphanage establishment for poor white male orphans, we shall dispose of those contentions of appellant which are so far-fetched as to be entirely devoid of merit.

Appellants contend that the City of Philadelphia was the primary object of testator's bounty. A study, nay a reading, of Girard's will quickly demonstrates that there is absolutely nothing in the will to support this theory, and that it is completely contrary to what Girard specifically and repeatedly said therein.

Appellants contend that Girard was interested in and wanted to aid the City of Philadelphia and the poor people of Philadelphia and therefore he must have wanted white and black orphans *and all poor people* of Philadelphia admitted to this orphanage establishment. Girard in several paragraphs of his will not only said he was interested in and wanted to aid the City of Philadelphia and the poor people thereof, but he specifically did exactly that in a number of bequests in his will which have been hereinabove recited. Of course, it is a non sequitor to say that because he wanted to aid the City and the poor, he must therefore have wanted all orphans, black or white orphans, or all poor people of Philadelphia admitted to the college, *when he specifically said something entirely different.*

Perhaps the most far-fetched and fantastic contention which was vigorously urged upon us was that if Girard had foreseen the Civil War and the subsequent Constitutional Amendments, particularly the Fourtenth Amendment, and certain recent decisions of the Supreme Court of the United States, and had lived in these modern times when colors and races intermingle and fraternize, he would have desired Girard College to be a college for all poor male orphans (or for all the poor people of Philadelphia) without distinction for race, creed or color.* These conjectures or contentions are merely wishful thinking or fantasies; none of them have any sound basis or merit whatsoever. Respected men and women, as well as eccentric people, sometimes make sound and sometimes eccentric wills. Courts, heirs and excluded beneficiaries often wish (1) they could change or delete clear and plain and specific language, or (2) rewrite a will to expand or change the testator's bounty in order to conform to what they believe would be fairer or wiser, or to conform to what they think the testator would have said if he had foreseen the exist-

* It was even argued that you could not be a good American citizen unless you went to a school composed of whites and colored.

ing facts and circumstances. But that is not and never has been the law of Pennsylvania!

". . . it is and always has been the law of Pennsylvania that every individual may leave his property by will to any person, or to any charity, or for any lawful purpose he desires, unless he lacked mental capacity, or the will was obtained by forgery or fraud or undue influence, or was the product of a so-called insane delusion. While it is difficult for many people to understand how or why a man is permitted to make a strange or unusual or an eccentric bequest, especially if he has children or close relatives living, we must remember that under the law of Pennsylvania, '"a man's prejudices are a part of his liberty. He has a right to the control of his property while living, and may bestow it as he sees fit" at his death: *McCown v. Fraser*, 327 Pa. 561, 192 A. 674; *Cauffman v. Long*, 82 Pa. 72.'": *Johnson Will*, 370 Pa. 125, 87 A. 2d 188.

In *Cannistra Estate*, 384 Pa. 605, 121 A. 2d 157, this Court said: "No rule regarding wills is more settled than the great General Rule that the testator's intent, if it is not unlawful, must prevail! This is the reason why so many cases continually proclaim that the pole star in the construction of every will isthe testator's intent. Moreover, 'The testator's intention must be ascertained from the language and scheme of his will: "it is not what the Court thinks he might or would have said in the existing circumstances, or even what the Court thinks he meant to say, but what is the meaning of his words": *Britt Estate*, 369 Pa. [450, 454, 87 A. 2d 243]': *Sowers Estate*, 383 Pa. 566, 119 A. 2d 60. . . .

"The language of Mr. Justice STEARNE, speaking for the Court in *Borsch Estate*, 362 Pa. 581, 67 A. 2d 119, is particularly appropriate: 'We said, in *Stoffel's Estate*, 295 Pa. 248, 145 A. 70, P. 251: "One possessed of testamentary capacity, who makes a will in Pennsylvania, may die with the justifiable conviction that the courts will see

to it that his dispositions, legally made, are not departed from by those charged with the duty of performance, . . .'" This always has been and unless changed or modified by the legislature, should continue to be the wise salutary policy of the Courts of Pennsylvania regarding wills."

Gifts to charity, outright or in trust, are favored by the law of Pennsylvania: *Daly's Estate*, 208 Pa. 58, 66, 57 A. 180; *Jordan's Estate*, 329 Pa. 427, 429, 197 A. 150; *McKee Estate*, 378 Pa. 607, 108 A. 2d 214. We have sustained charitable trusts for every conceivable charity—sectarian churches, hospitals and homes of all denominations, charitable gifts for denominational or sectarian ministers, for priests, for free masons, for aged couples, for aged Israelities, for widows, for all classes of society, and even for agnostic societies. Gifts to private schools and colleges have been sustained as valid and constitutional. Cf. *Pierce v. Hill Military Academy*, 268 U. S. 510; *Craig Estate*, 356 Pa. 564, 52 A. 2d 650; *Donohugh's Appeal*, 86 Pa. 306; *Hill School Tax Exemption Case*, 370 Pa. 21, 87 A. 2d 259; *Philadelphia v. Women's Christian Ass'n*, 125 Pa. 572, 17 A. 475; *Episcopal Academy v. Phila.*, 150 Pa. 565, 25 A. 55.

In *Craig Estate*, 356 Pa., supra, testatrix's gift of $25,000 to the Trustees of the Central Presbyterian Church, to be retained as a permanent fund and the income used in keeping the church properties in order and for such other church purposes as the trustees may direct, was sustained even though the church disolved and a new or substituted trustee was appointed by the Orphans' Court. The Court said: "Where a gift is made directly to a charitable or religious body for purposes which are within the powers of the corporation, it is a trustee for itself, and holds for the purposes specified in the gift. It is, however, a trust in the sense that the fund does not merge into the general property of the corporation but remains under the jurisdicton of a court of Equity. Equity has power to

define the trust and to restrain any violation of it. See Wilson v. Board of City Trusts, 324 Pa. 545. . . .

"In Pennsylvania the control and disposition of church property is subject to the rules and regulations of the religious body to which the church belongs: Act of June 20, 1935, P. L. 353, 10 PS 81; *Canovaro v. Brothers of St. Augustine*, 326 Pa. 76; but both that act and the decision cited recognize that donations and gifts in trusts lawfully established by wills or reserved in writing must be preserved and given due effect; an all-sufficient reason being given in *Brown v. Hummell*, 6 Pa. 86, 95, namely, that the hand of private benevolence be not stayed and checked by the conviction that the will of the donor may not be preserved."

In *Pierce v. Hill Military Academy*, 268 U. S., supra, the Court said (page 514): "This Court, like the court below, must know that the true purpose of the act, as well as its plain and intended practical effect, was the destruction of private primary, preparatory and parochial schools; for they certainly could not survive the denial of the right of parents to have their children thus educated in the primary grades. Such drastic and extraordinary legislation is a portentous innovation in America. Private and religious schools have existed in this country from the earliest times. Indeed, the public or common school, as we know it today, dates only from 1840. For generations all Americans—including those who fought for liberty and independence in the eighteenth century, and who drafted the Declaration of Independence, the Northwest Ordinance of 1787, and the Constitution of the United States—were educated in private or religious schools, and mostly the latter. Perhaps no institution is older or a more intimate part of our colonial and national life than religious schools and colleges, both Catholic and Protestant. The private and religious schools have been the laboratories in which educational methods have been worked out and pedagogic progress accomplished from the very beginning of our his-

tory. Out of them have developed, or to them is due, our greatest colleges and universities, the most important of them to this day being private or religious institutions. In more recent times commonwealth colleges and universities have grown up. The legislation before the court manifestly carries within itself a threat, not merely to the private elementary and preparatory schools which it now practically proscribes, but to every private or religious preparatory school and every private or religious college or university in the land."

The right to dispose by will of one's property is one of the most treasured rights of an American citizen, and if the will does not violate the law, not even the legislature can pervert or destroy a man's validly executed will: *Brown v. Hummel*, 6 Pa. 86, 95.*

Appellants argue that Girard's will discriminates against negroes. It could just as readily be argued, and it would be just as irrelevant, that it similarly discriminates against all girls—white, red, yellow, brown and black—against white boys who are not orphans,—against white boys who are not poor,—as well as against all poor boys who are not born in Philadelphia. The fact that a testator prefers to leave his money by will, or limit and restrict his testamentary bequests to some of his children, or to some of his relatives instead of to all of his children, or all of his relatives, or to a church or charity instead of to his relatives, or for people suffering with certain diseases, or for aged Protestants, or "for the poor of the German Lutheran Congregation", or for the "Roman Catholic Church of Saint Coleman for its own uses and purposes", or to a named Catholic priest or church for the poor of that parish, or for a named sectarian Orphanage, or for a sectarian or denominational church or home or charity or for any chari-

* See also: *Crawford Estate*, 362 Pa. 458, 67 A. 2d 124; *Warden Trust*, 382 Pa. 311, 314-315, 115 A. 2d 159; *McKean Estate*, 366 Pa. 192, 77 A. 2d 447; *Borsch Estate*, 362 Pa. 581, 67 A. 2d 119; *Willcox v. Penn Mutual Life Insurance Co.*, 357 Pa. 581, 55 A. 2d 521.

table purpose, does not constitute discrimination in its legal meaning. In *Wharton Appeal*, 373 Pa. 360, 369, 96 A. 2d 104, the Court said: "A testator . . . may exclude any one whom he wishes, except a surviving spouse. The reason for the exclusion need not be stated by testator and will not be passed upon by a court."

It is indisputable that nearly every charitable bequest excludes more than half of the public, but it does not for that reason cease to be a valid charitable gift, or be unconstitutional, or become the property of the State or Municipality in its governmental capacity.

A Century of Interpretation By Parties and Courts

Not only is Girard's will crystal clear that he wished, meant, said and intended that only "poor white male orphans" should be admitted to Girard College, but that very interpretation and construction has been placed upon this testamentary provision of his will for over 100 years (1) by those who have administered and managed the trust estate for Girard College (which now amounts to approximately $98,000,000), and (2) by the Supreme Court of the United States, and (3) by the Supreme Court of Pennsylvania, and (4) by the lower Courts of this Commonwealth, and (5) by the present appellant—the City of Philadelphia.

It is very important to note that this is a privately founded and privately endowed charity—an "orphanage establishment", a college and home for orphans—*poor white male orphans.* Girard College is not and never was a government owned piece of real estate or building or public college; it was not constructed and it is not and never was maintained by the State, the City or its agents from tax money or public funds, nor has the public as such ever been admitted. Girard College was built on land owned by Girard, with Girard's own money, and every dollar of its construction, maintenance and upkeep, and the salaries

or wages of its teachers and employes, and the food, clothing, lodging maintenance and education of its boys have been paid by and from the private funds of a private citizen, Stephen Girard. We repeat, neither the City of Philadelphia nor the Commonwealth of Pennsylvania nor the Government of the United States have ever paid or contributed one cent toward the construction or maintenance of the College, or the salaries of its teachers, or the feeding, clothing, maintenance or education of any of the orphan boys who live and study therein.

Perhaps equally important, Girard College was never administered by the City in its governmental or sovereign capacity. It was administered originally by the Mayor, Aldermen and Councils, and subsequently by an independent agency created by the Legislature *solely in the capacity of a fiduciary or trustee governed, bound and limited by the directions and provisions of Girard's Will.**

Today neither the Mayor of Philadelphia nor any of the departments under him, nor City Council administers, manages or operates the orphanage known as Girard College in any capacity whatsoever. Today under the Philadelphia Home Rule Charter adopted April 17, 1951, effective January 7, 1952, neither Girard College nor its Board of Directors of City trusts are included within the City government; on the contrary, the Board of Directors of City Trusts, which administers Girard's testamentary trust known as Girard College, is specifically excluded from the City Charter. Section A-100 of the Philadelphia Home Rule Charter provides: "Except as otherwise specifically provided, this charter shall not apply to the Board of Directors of City Trusts and to any institutions operated by it." And the annotation thereto states: "4. The Board of City Trusts is generally not dealt with by the Charter to protect its special status as a trustee."

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* One of the basic fallacies of appellants is their failure to recognize the distinction between the City's actions in its governmental capacity and its actions in its capacity as a fiduciary or trustee.

The Girard Trust is administered and managed by a Board of Directors of City Trusts which is composed of 14 members: Five leading business men, four leading lawyers, two leading bankers, a doctor, and ex-officio, the Mayor of Philadelphia and the President of City Council. The Board of Directors is not selected or elected or appointed by the Mayor or by City Council or by the citizens of Philadelphia—it is selected and appointed by the Judges of the Courts of Common Pleas of Philadelphia County and is, we repeat, a separate, independent entity which was specifically excluded from the Philadelphia City Charter.

When the City of Philadelphia administered Girard College, it administered it in the capacity, not of a government or sovereign dealing as it wished with its own public property, but *solely as a fiduciary trustee to carry out the directions of Girard's will by which it was limited and bound.* It was compelled under Paragraph XXIV of Girard's will to keep an account of his estate separate and distinct from all other moni s and accounts of the City; it had to furnish annually to the Legislature an account so that a Commitee of the Legislature could examine it and see that his estate was applied only to the purposes set forth in his will and that his "intentions had been fully complied with". The reason for Girard's appointment of the City as trustee is obvious. When Girard made his will in 1830 he naturally desired a perpetual trustee to carry out the wonderful and perpetual charitable orphanage and college he so earnestly desired and so minutely prescribed. Sitting in Girard's armchair, as we must do, to look at the attendant and surrounding circumstances,* Girard, an outstanding banker, must have known that there was not a single trust company in the City of Phila-

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* *McFadden Estate*, 381 Pa. 464, 112 A. 2d 148; *Wright Estate*, 380 Pa. 106, 110 A. 2d 198; *Edmunds Estate*, 374 Pa. 22, 97 A. 2d 75; *Kehr Will*, 373 Pa. 473, 95 A. 2d 647; *Britt Estate*, 369 Pa. 450, 87 A. 2d 243.

delphia** to act in the capacity of a perpetual trustee. That is, we repeat, the obvious reason why the City was appointed trustee.

A municipality, if it is authorized to do so by the Legislature, can act (1) in its sovereign or public or governmental capacity; (2) in its private or proprietary capacity, in which event it is considered a separate entity acting for its own private purposes and not as a subdivision of the State: Cf. *White Oak Borough Authority Appeal*, 372 Pa. 424, 93 A. 2d 437; *Shirk v. Lancaster City*, 313 Pa. 158, 169 A. 557; *Western Saving Fund Society v. Philadelphia*, 31 Pa. 175; *Moore v. Luzerne County*, 262 Pa. 216, 105 A. 94; *Bell v. Pittsburgh*, 297 Pa. 185, 146 A. 567; *Madden v. Borough of Mt. Union*, 322 Pa. 109, 185 A. 275; *Carlisle Gas & Water Co. v. Carlisle Borough*, 218 Pa. 554, 67 A. 844; *Commonwealth v. P. R. T. Co.*, 287 Pa. 70, 134 A. 452; *Versailles Township Authority v. McKeesport*, 171 Pa. Superior Ct. 377, 90 A. 2d 581; or (3) *in a fiduciary (trustee)* capacity, in which event it, like any individual or corporate trustee, is bound by and has only the powers and authority given it by the will or deed of trust: *Vidal et al. v. Girard's Executors*, 43 U. S. 127; *Girard v. Philadelphia*, 74 U. S. 1; *Philadelphia v. The Heirs of Stephen Girard*, 45 Pa. 9; *Philadelphia v. Fox*, 64 Pa. 169; *Philadelphia v. Elliott*, 3 Rawle 169.

**The Pennsylvania Company for Insurance on Lives and Granting Annuities, now known as The First Pennsylvania Banking and Trust Company, was incorporated in 1812, but did not acquire trust powers until 1836. The Girard Trust Company, now the Girard Trust Corn Exchange Bank, was incorporated in 1836. The Fidelity Trust Company, now the Fidelity-Philadelphia Trust Company, was incorporated in 1866. The Provident Trust Company was incorporated in 1865. The Real Estate Title Insurance Company, now known as Tradesmens Bank and Trust Company, was incorporated as a title company in 1876 and first acquired trust powers in 1889. These were the first trust companies in Philadelphia and their importance trust-wise is further evidenced by the fact that in 1847 the Pennsylvania Company had total trust assets of only $176,000.

Before the College was constructed, Girard's testamentary trust for the College was vigorously attacked by his heirs, but *was sustained* as a valid charitable trust by the Supreme Court of the United States in *Vidal et al. v. Girard's Executors*, 43 U. S. 127. The heirs were represented by Daniel Webster and other leading lawyers of that day. That case arose by a bill in equity to set aside Girard's testamentary trust for the College. Mr. Justice STORY said, inter alia: "The persons who are to receive the benefits of the institution he declared to be, '*poor white male orphans* between the ages of six and ten years; . . .'. The principal questions, to which the arguments at the bar have been mainly addressed, are: First, whether the corporation of the city of Philadelphia is capable of taking the bequest of the real and personal estate for the erection and support of a college *upon the trusts and for the uses designated in the will;* Secondly, whether these uses are charitable uses valid in their nature and capable of being carried into effect consistently with the laws of Pennsylvania: . . . where the corporation has a legal capacity to take real or personal estate, there it may take and hold it *upon trust, in the same manner and to the same effect as a private person may do.* It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. *But that will furnish no ground to declare the trust itself void,* if otherwise unexceptionable; but *it will simply require a new trustee to be substituted by the proper court,* possessing equity jurisdiction, to enforce and perfect the objects of the trust. . . . In such a case, the trust itself being good, will be executed by and under the authority of a court of equity. Neither is there any positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them; nay, for the benefit of a stranger or of another corporation. . . . We think,

then, that the *charter of the city does invest the corporation with powers and rights to take property upon trust for charitable purposes*, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania. . . .

"We are, then, led directly to the consideration of the question which has been so elaborately argued at the bar, as to the validity of the trusts for the erection of the college, according to the requirements and regulations of the will of the testator. That the trusts are of an eleemosynary nature, and charitable uses in a judicial sense, we entertain no doubt. Not only are charities for the maintenance and relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars. . . .

"Several objections have been taken to the present bequest to extract it from the reach of these decisions. In the first place, that the corporation of the city is incapable by law of taking the donation for such trusts. This objection has been already sufficiently considered. . . .

"This objection is that the foundation of the college upon the principles and exclusions prescribed by the testator, is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania; and this for two reasons: First, because of the exclusion of all ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college, or even visiting the same: and Secondly, because it limits the instruction to be given to the scholars to pure morality, and general benevolence, and a love of truth, sobriety, and industry, thereby excluding, by implication, all instruction in the Christian religion."

In *Girard v. Philadelphia*, 74 U. S. 1—which was an action of ejection where the issue was the meaning and validity of Girard's will—the Supreme Court of the United States *again* sustained the validity of Girard's testamentary trust for the orphanage college and again pointed out that the College was the primary object of his bounty. The Court said, inter alia: ". . . the attempt to restrain the alienation of the realty, being inoperative, could not affect the validity of the devise,* and that the income of the whole residuary was devoted to the three objects stated by the testator, *the college being the 'primary object,'* and that so long as any portion of this residuary fund should be found necessary for 'its improvement and maintenance,' on the plan and to the extent declared in the will, *the second and third objects could claim nothing.* . . .

". . . Now, it is admitted (for it has been so decided), that till February, 1854, the corporation was vested with a complete title to the whole residue of the estate of Stephen Girard, *subject to these charitable trusts*, and consequently, at that date, his heirs at law had no right, title, or interest whatsoever in the same. But the bill alleges that the act of the legislature of that date (commonly called the 'Consolidation Act'), which purports to be a supplement to the original act incorporating the city, has either dissolved or destroyed the identity of the original corporation, and it is consequently unable any longer to administer the trust. *Now, if this were true, the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee.* . . .

"Now, it cannot be pretended that the legislature had not the power to appoint another trustee if the act had dissolved the corporation, or to continue the rights, duties, trusts, &c., in the enlarged corporation. It has done so, and has given the widest powers *to the trustee to admin-*

* The same question is raised again in the instant case and was raised and decided adversely to the appellants in *Girard Estate*, 73 D. & C. 42.

ister the trusts and charities according to the intent of the testator, as declared in his will.

"The legislature may alter, modify, or even annul the franchises of a public municipal corporation,* although it may not impose burdens on it without its consent. In this case, the corporation has assented to accept the changes, assume the burdens, and perform the duties imposed upon it; and it is difficult to conceive how they can have forfeited their right to the charities which the law makes it their duty to administer. *The objects of the testator's charity remain the same*, while the city, large or small, exists; *the trust is an existing and valid one*, the trustee is vested by law with the estate, and the fullest power and authority to execute the trust.

". . . it cannot admit of a doubt that, where there is a valid devise to a corporation, in trust for charitable purposes, unaffected by any question as to its validity because of superstition, the sovereign may interfere to enforce the execution of the trusts, either by changing the administrator, if the corporation be dissolved, or, if not, by modifying or enlarging its franchises, *provided the trust be not perverted, and no wrong done to the beneficiaries.* Where the trustee is a corporation, no modification of its

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*Unless authorized by the Constitution or by an Act of Assembly, cities and municipalities are not sovereigns; they have only such powers and such rights of legislation as are authorized by the Constitution or by an Act of the Legislature. *Genkinger v. New Castle*, 368 Pa. 547, 549, 84 A. 2d 303; *Kline v. Harrisburg*, 362 Pa. 438, 68 A. 2d 182; *Commonwealth v. Moir*, 199 Pa. 534, 541, 49 A. 351; *Murray v. Philadelphia*, 364 Pa. 157, 71 A. 2d 280; *Philadelphia v. Fox*, 64 Pa. 169, 180; *Trenton v. New Jersey*, 262 U. S. 182; *Hunter v. Pittsburgh*, 207 U. S. 161; *Pittsburg's Petition*, 217 Pa. 227, 66 A. 348. This was the reason why the City of Philadelphia had Acts passed by the Legislature in 1832 and 1847 to enable it to accept the gifts made in Girard's Will, viz., (a) to construct Delaware Avenue and repair wharves, and (b) "to appoint . . . agents . . . to carry out the . . . *trusts* created by the will of Stephen Girard."

franchises, or change in its name, while its identity remains, can affect its rights to hold property devised to it for any purpose. *Nor can a valid vested estate, in trust, lapse or become forfeited by any* misconduct in the trustee, or *inability in the corporation to execute it*, if such existed. Charity never fails; and it is the right, as well as the duty of the sovereign, by its courts and public officers, as also by legislation (if needed), to have the charities properly administered.

"Now, there is no complaint here that the charity, *so far as regards the primary and great object of the testator*, is not properly administered; and it does not appear that there now is, or ever will be, any residue to apply to the secondary objects. . . .

"1st. The residue of the estate of Stephen Girard, at the time of his death, was, by his will, vested in the corporation *on valid legal trusts*, . . .".

These cases completely answer and refute all of appellants' contentions.

The Courts of Pennsylvania have likewise repeatedly passed upon and sustained the validity of Girard's testamentary trust for this orphanage establishment or college for "poor white male orphans" and have recognized it as the primary object of his bounty.

Girard's Will first came directly before this Court*

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* As early as 1846, Girard's Will had become a landmark in the realm of charitable trusts. In *Brown v. Hummel*, 6 Pa. 86, testator devised his estate to trustees to establish an orphan home for the education of poor orphans. He provided in his Will how the succeeding trustees should be chosen. The legislature attempted by Act of April 21, 1846, to require the trustees to be chosen in a manner and by persons different from that set forth by the testator. The Court declared the Act to be unconstitutional and void and said, inter alia: "If the legislature, by ex parte enactment, can alter the will of a private individual, whose will shall escape? On whose will shall the hand of legislative innovation next be laid? . . . *What private charity will next be disturbed and invaded?* The will of Stephen Girard offers a conspicuous mark. How many charities in

in *Soohan v. The City of Philadelphia*, 33 Pa. 9. The Court there decided that a fatherless child is an orphan within the meaning of Girard's will and that a preference was to be given to those orphans born within the original corporate limits of Philadelphia, as laid out by William Penn, and existing at the death of the testator. Before coming to this conclusion, the Court in an elaborate opinion, pointed out that *the orphans must be poor white male orphans* between the age of six and ten years. The Court, in reviewing Girard's will, said (page 22):

"Then follow ten paragraphs in which *he directs* how his college shall be organized and managed, and *what orphans shall be admitted into it.* They must be *poor white male orphans* between the age of six and ten years, and must be bound to the corporation of the city. Priority of application to entitle to preference, all other things concurring; if more applicants than vacancies preference shall be given, 'First, to orphans born in the city of Philadelphia; Secondly, to those born in any other part of Penn-

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the character of hospitals, asylums, and schools, in the state, are exposed to the same peril as the charity created by the will of George Fry? . . . If the legislature can alter one man's will, by license of the constitution, they can alter the will of every man." *If the legislature cannot alter a man's will, certainly the City, which is an agent of the legislature, cannot do so.*

In *Benjamin Franklin's Administratrix v. City of Philadelphia;* 2 D.R. page 435, the lower Court sustained a charitable gift by Franklin to the inhabitants of Philadelphia in trust to pay the income for the benefit of apprentices with gifts over thereafter. That Court, speaking of Girard's trust for the orphanage College, said: ". . . yet only a class, and that a small class of the people can obtain the benefit of it. Girls are excluded; boys whose fathers are living are excluded; men and women are excluded; in short, *all but 'poor white male orphans' are excluded.* Nevertheless, it is a great charity, and withstood numerous and persistent attacks in the courts of Pennsylvania and of the United States, until now it is fixed, firm, and as immovable as a rock: Vidal v. Girard's Executors, 2 Howard, U. S. 127; Philadelphia v. Girard's Heirs, 45 Pa. 9; Girard v. Philadelphia, 7 Wallace, 1."

sylvania; Thirdly, to those born in the city of New York (that being the first port on the continent of North America at which I arrived); and lastly, to those born in the city of New Orleans (being the first port on the said continent at which I first traded in the first instance, as first officer, and subsequently as master and part owner of a vessel and cargo).'"

In *City of Philadelphia v. The Heirs of Stephen Girard*, 45 Pa. 9, the testamentary trust for the College was again attacked and sought to be voided because of (a) the provision against alienation of the real estate and (b) the provision for accumulation. This Court held that even if the subordinate provisions against alienation and accumulations were invalid, this would not destroy the validity of the testamentary trust for the college. In that case this Court once again pointed out that Girard's testamentary trust for the College had been sustained, against vigorous attacks, by the Supreme Court in *Vidal v. Girard's Executors*, 43 U. S., supra. This Court in its opinion said, pages 25-28: "In all gifts for charitable uses the law makes a very clear distinction between those parts of the writing conveying them, which declares the gift and its purposes, and those which direct the mode of its administration. And this distinction is quite inevitable, for it is founded in the nature of things. We must observe this distinction in studying Mr. Girard's will, otherwise we run the risk of inverting the natural order of things by subordinating principles to form, the purpose to its means, the actual and executed gift for a known purpose to the prescribed or vaticinated modes of administering it, that are intended for adaption to an unknown future, and of thus making the chief purpose of the gift dependent on the very often unwise directions prescribed for its future security and efficiency.

"There is no sort of difficulty in making an analysis of the relevant parts of this will in accordance with this distinction.

"It is a devise of all the residue of his real and personal

estate to the city of Philadelphia, an existing corporation, in trust, *as his 'primary object,'* to construct, furnish, constitute, and maintain the institution now known as the Girard College, and then for certain municipal purposes, not necessary to be now specified. . . .

"4. Possibly some of the directions given for the management of this charity are very unreasonable and even impracticable; but this does not annul the gift. The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend on the insufficiency of the formal intention: 7 Ves. 69; 4 Id. 329; 14 Simons 232; 17 S. & R. 91; 1 M. & W. 287.

"5. And this is the doctrine of cy pres, . . . a reasonable doctrine, by which a well-defined charity, or one where the means of definition are given, may be enforced *in favour of the general intent*, even where the mode or means provided for by the donor fail by reason of their inadequacy or unlawfulness."

Girard's Will next came before this Court in *Philadelphia v. Fox*, 64 Pa. 169. The legislature passed an Act of June 30, 1869, providing for a separate body of citizens *for the administration of trusts* vested in the city, to be known as the Board of Directors of City Trusts. The City contested the constitutionality of this Act and contended, inter alia, that the legislature could not take away the property of the municipal corporation without payment, and that every citizen of Philadelphia and every owner of property in the territorial limits in the old city of Philadelphia had a pecuniary interest in the devise of Mr. Girard. The City's contentions were rejected by this Court which, speaking through Justice SHARSWOOD, said, inter alia:

"The City of Philadelphia is beyond all question a

municipal corporation, that is, a public corporation created by the government for political purposes, and having subordinate and local powers of legislation: 2 Kent's Com. 275; an incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government: Glover Mun. Corp. 1. It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government—essentially a revocable agency—having no vested right to any of its powers or franchises—the charter or act of erection being in no sense a contract wtih the state—and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion. . . .

"*Such a municipal corporation may be a trustee*, under the grant or will of an individual or private corporation, but only as it seems for public purposes, germane to its objects: . . . .

". . . When, therefore, the donors or testators of these charitable funds granted or *devised them in trust* to the municipality, they must be held to have done so with the full knowledge that their trustee so selected was a mere creature of the state, an agent acting under a revocable power. Substantially they trusted the good faith of the sovereign. It is plain—too plain, indeed, for argument, that the corporation by accepting such trusts, could not thereby invest itself with any immunity from legislative action. Such an act could not change its essential nature. It is surely not competent for a mere municipal organization, *which is made a trustee of a charity*, to set up a vested right in that character to maintain such organization in the form in which it existed when the trust was created, and thereby prevent the state from changing it as the public interests may require: Montpelier v. East Montpelier, 29 Verm. 21. This whole question is put at rest,

and that as to one of the most important of these trusts and as to this trustee, by the opinion of the Supreme Court of the United States in Girard v. Philadelphia, 7 Wallace 14: 'It cannot admit of a doubt,' says Mr. Justice GRIER, 'that where there is a valid devise to a corporation, in trust for charitable purposes, unaffected by any question as to its validity because of superstition, the sovereign may interfere to enforce the execution of the trusts, either by changing the administrator if the corporation be dissolved, or if not, by modifying or enlarging its franchises, *provided the trust be not perverted, and no wrong done to the beneficiaries.*"

CY PRES

The doctrine of cy pres is totally inapplicable in the instant case because that part of the will which appellants attack, namely, testator's dominant intent to establish a home and college for *"poor white male orphans" is clearly and unmistakably declared and can be literally and lawfully carried out.* Appellants have completely misunderstood the doctrine of cy pres and when and for what purpose it will be applied. Cy pres is a well recognized equitable doctrine which is applicable when the object of a charitable bequest is not clear, or testator's dominant purpose and intent can not be literally and lawfully carried out, or when one or more of the directions concerning the charitable gift or the subordinate purposes or administrative provisions cannot be literally or lawfully carried out. In such an event the Courts sustain the charity and all the provisions which are ascertainable and valid, and apply the bequest as well as the subordinate or administrative provisions of the will as nearly as possible to testator's general dominant intent.

14 Corpus Juris Secundum, Charities, §52, page 512, aptly and accurately states: "§52.—Cy Pres Power as Judicial Function. a. Definition and Nature. Cy pres means 'as near to', and the doctrine is one of construction,

the reason or basis thereof being to permit the main purpose of the donor of a charitable trust to be carried out as nearly as may be *where it cannot be done to the letter.*"

William Estate, 353 Pa. 638, 46 A. 2d 237, furnishes an accurate exposition and a proper application of cy pres. In that case, testatrix left her residuary estate in trust to establish a charitable home in the dwelling house she occupied and the adjoining grounds contiguous thereto for aged women who were unable to support themselves. The prospective beneficiaries were limited to residents of the County of Tioga, Pa. The residuary estate was insufficient for the purpose of carrying out testatrix's intent in the exact manner prescribed as recited above. The Orphans' Court applied the cy pres doctrine and awarded the residuary estate to the Soldiers and Sailors Memorial Hospital for the approximate charitable uses which testatrix specified. The Court said: ". . . The case therefore properly calls for an exercise of the court's cy pres power to prevent a failure of the testatrix's general charitable intent.

"However, as we said in Wilkey's Estate, supra, [337 Pa. 129], at pp. 132-133,—'In applying the principle of cy pres the court does not arbitrarily substitute its own judgment for the desire of the testator, or supply a fictional testamentary intent, but, on the contrary, it seeks to ascertain and carry out as nearly as may be the testator's true intention; . . .'."

In *Wanamaker Estate*, 364 Pa. 248, 72 A. 2d 106, where the fund was inadequate for the exact purpose designated by the testator, the doctrine of cy pres was wisely applied and the Court said, inter alia:

". . . When a court applies the doctrine of cy pres it is not thereby arbitrarily substituting a beneficiary in place of the one designated by the testator, nor is it substantially altering the testamentary intent; on the contrary, it is carrying out that intent in its broader outlines in accordance with the testator's more fundamental wishes as the court interprets them. . . ."

It is unnecessary to review additional authorities or to cite the many cases enunciating or dealing with the doctrine of cy pres in order to demonstrate what every student of the law of wills knows, namely, cy pres is never applicable to destroy a charitable bequest or a charitable trust, or to pervert or defeat testator's dominant intent, as appellants would have us do in the instant case by omitting the word "white".

CITY HOLDS THE GIRARD ESTATE, NOT IN ITS GOVERNMENTAL CAPACITY, BUT IF AT ALL, ONLY IN ITS FIDUCIARY CAPACITY

It is, beyond any question, clear from Girard's Will that the City held Girard's residuary trust estate for the College *only in a fiduciary capacity*—that is as trustee for the persons, uses, purposes and trusts which were clearly set forth, defined and limited in Girard's Will. One of appellants' fundamental fallacies is their failure to recognize that the City can act in a fiduciary capacity as distinguished from a governmental capacity, and that with respect to Girard College (as also with respect to 88 other trusts) it is acting *solely as a trustee.* Appellants likewise fail to realize that the manifold activities performed by the City in connection with Girard College are performed not in its governmental capacity, but in its capacity as trustee. We again emphasize that the Supreme Court of the United States expressly held in *Vidal v. Girard's Executors*, 43 U. S. 127, supra, that the City of Philadelphia took the bequest for the erection and support of Girard's orphanage establishment "*upon the trusts* and for the uses designated in the will . . . the charter of the city does invest the corporation with powers and rights to take property *upon trust for charitable purposes*, . . . where the corporation [the City] has a legal capacity to take real or personal estate, there it may take and hold it *upon trust, in the same manner and to the same effect as a private person may do.* It is true that, if the trust be repugnant

to, or inconsistent with the proper purposes for which the corporation was created, . . . that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but *it will simply require a new trustee to be substituted* by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust."

In *Girard v. Philadelphia*, 74 U. S., supra, the Court again said: ". . . the corporation was vested with a complete title to the whole residue of the estate of Stephen Girard, *subject to these charitable trusts*. . . . The legislature . . . has given the widest powers to the trustee *to administer the trusts* and charities *according to the intent of the testator, as declared in his will.*"

In *City of Philadelphia v. The Heirs of Stephen Girard*, 45 Pa. 9, the Court said (p. 25): "It [the Will] is a devise of all the residue of his real and personal estate to the city of Philadelphia, an existing corporation, *in trust, as his 'primary object,'* to construct, furnish, constitute, and maintain the institution now known as the Girard College, ..."

Not only did the Supreme Court of the United States as well as the Supreme Court of Pennsylvania and the lower Courts of Pennsylvania and the Legislature of Pennsylvania recognize (as above recited) that the City held Girard's residuary estate for Girard College *in its capacity as a trustee under Girard's Will*, but the City itself has recognized that the City held said estate *as trustee, and did not hold or own this property in its governmental or municipal capacity*. The City caused the Legislature in 1832 and 1847 to pass an Act authorizing it (a) to accept Girard's testamentary bequests for the improvement of the City, and (b) to cary out the charitable uses and trusts set forth in his will. This was wise because, as we have seen, the City of Philadelphia is not a sovereign, and the only powers it possesses are those granted to it by the Legislature, which, as stated by this Court in *Philadelphia v. Fox*, 64 Pa., supra, could be enlarged or terminated by the Legislature at will.

The Board of Directors of City Trusts contends that "poor white male orphans" means exactly what the testator said and should be upheld; on the other side, the City seeks to void or diametrically alter this bequest. *The City* —assuming, arguendo, that it has a standing in this case, although under the Philadelphia Home Rule Charter the Board of Directors of City Trusts, is, as above noted, a separate and distinct entity which is excluded from the Charter—*has on five prior occasions demonstrated that its status and rights in the Girard Estate were only those of a trustee.* For example, in 1921 the City of Philadelphia in its governmental capacity condemned and took from the City of Philadelphia, *Trustee under the Will of Stephen Girard*, Piers Nos. 1 and 2 on North Delaware Avenue, paying therefor *to the Trustee* out of the City's general funds, $849,672.46. On March 25, 1927, after application to and approval by the Orphans' Court of Philadelphia County, the City purchased two tracts of land at Swanson Street and Pattison Avenue, Philadelphia, for the sum of $15,600. This sum the City paid to the Board of Directors of City Trusts, *Trustee under the Will of Stephen Girard*, out of its general funds. In December, 1947, the City in its governmental capacity, condemned for playground purposes a tract of land in South Philadelphia which was a part of the Estate of Stephen Girard. A jury awarded to the *Trustee* the sum of $50,000 for the property; the verdict was paid by the City out of its general funds. With the approval of the Orphans' Court of Philadelphia County, the *City* of Philadelphia on May 8, 1953, *purchased from the Trustee* under the Will of Stephen Girard certain tracts of land in Pike County for $100,000, said tracts to be used as a boys' camp. Again on April 5, 1954, by decree of the Orphans' Court of Philadelphia County, the *Trustee under the Will of Stephen Girard*, conveyed a tract of ground known as Girard Park, to the City to be used by the City for an open public place and park and for no other use and purpose whatsoever.

Do not those actions of the City further demonstrate that in its relationship to the Girard Estate it was acting solely as trustee and not in its governmental capacity!

How specious and fallacious is the appellants' argument that the City was acting in a governmental capacity instead of in a fiduciary trustee capacity with respect to Girard's Estate, is further obvious from the fact that *if it were acting in a governmental capacity* or if its actions were "State action", *it could legislatively change or pervert or terminate all of the purposes and objectives* minutely prescribed in Girard's Will. For example, it could legislatively provide that all poor children, instead of poor white male orphans, could be admitted to Girard College; or it could provide that only female children could be admitted to Girard College; or it could provide for co-education; or it could, we repeat, alter or pervert at will or absolutely destroy the purposes and objectives of Girard's Will and exercise complete control over the College as if it were a public institution. Appellants do not specifically so contend, but that is the logical conclusion of their contention that the City was acting in a governmental capacity.

It is as clear as crystal that until the present suit was brought, the Courts, the Legislature, and even the City of Philadelphia recognized that the City did not own or hold Girard's residuary estate (for the orphanage establishment now known as Girard College) in its governmental capacity, but either it or the Board of Directors of City Trusts owned or held all the said property of the Girard Estate *as Trustee* for the persons, uses and purposes specifically set forth and defined and limited in and by Girard's Will.

The cases of *Wilson v. Board of City Trusts*, 324 Pa. 545, 188 A. 588, and *Girard Estate*, 73 D. & C. 42, on which appellants rely, refute, instead of support, the position of the appellants and their aforesaid contentions. What the *Wilson* case holds and stands for is clear from the following quotations from the opinion of this Court:

"S. Davis Wilson, as Mayor of the City of Philadelphia, and as a member of the Board of City Trusts, petitioned the Court of Common Pleas of Philadelphia County for an alternative writ of mandamus to compel the remaining Directors of the Board of City Trusts to submit their books, records, accounts and documents relating to the management and administration of the moneys and properties in their control to three experts to be appointed by him, for the purpose of an inspection, examination and audit so that he might be enabled to properly perform his duties and functions *as a trustee* and properly protect and safeguard public interests and moneys. . . .

". . . All trusts created by wills are within the exclusive jurisdiction of the orphans' court and trusts inter vivos may fall within the jurisdiction of the two courts.

"To whom then is the Board of City Trusts accountable? The Act of June 30, 1869, P. L. 1276, provided that 'the duties, rights and powers of the City of Philadelphia, concerning all property . . . dedicated to charitable uses or trusts, the charge or administration of which are now or shall hereafter become vested in . . . the city . . . shall be discharged by the said city through . . . a board composed of fifteen persons, including the mayor of said city, . . . to be called directors of city trusts, who shall exercise and discharge all the duties and powers of said city, . . . concerning any such property appropriated to charitable uses . . . to the extent that the same have been or may hereafter be, by statute law or otherwise, vested in and delegated to the said city. . . .'

"The common pleas judges, acting as a board of appointment, designate the members of the Board and may remove them (Act of June 30, 1869, P. L. 1276, Sec. 2, and Act of May 25, 1874, P. L. 228). This power they have, however, not in the capacity of a court, but as a board of appointment. The persons named under the Act of 1869 are the representatives or agents of the City of Philadelphia *as trustee*. While the board of judges of the

common pleas court appoints the trustees, the orphans' court possesses exclusive control over them in the conduct of testamentary trusts. *They are, as to the orphans' court, in the same situation as other trustees amenable to them.*

"What is the relation of this Board to the government of the municipality under the Act? As stated by Judge SHARSWOOD, in Philadelphia v. Fox, 64 Pa. 169, where the Act of 1869 first came up for consideration, it merely provided that one function of municipal government that had theretofore been exercised by the City generally, was removed and placed in a body of fifteen men, while the Mayor, Council and other officers continued to exercise all other governmental functions. Both groups are constituents of City government but they are independent of each other. Judge SHARSWOOD there said, the directors are '*a board dissociated from the general government of the city.*' It performs a part of the city's duties and as such, could be considered a part of the City government, but *its functions are apart from the general governmental powers exercised by the City itself.* . . .

"The law is clear that a trustee may compel his co-trustee to permit an examination, inspection and audit of the records of the trust estate and all matters in connection therewith that he may perform the duties with which he is intrusted and for whose exercise he is responsible."

Girard Estate, 73 D. & C., supra, is well summarized in the syllabus: "The orphans' court will, by virtue of the authority conferred upon it by the Revised Price Act of June 7, 1917 . . ., and the Fiduciaries Act of April 18, 1949 . . ., and in application of the cy pres doctrine, authorize the Board of Directors of City Trusts charged with the administration of the Stephen Girard Estate to sell a large number of homes owned by the estate in Philadelphia, even though the will prohibits the sale of Philadelphia real estate, where it appears . . . that serious deterioration will occur in the foreseeable future, . . . that their operation is presently being conducted at a loss,

. . . that the proceeds of the sale would produce a substantial income and that *such income is necessary in order to continue to carry out the primary purpose of testator's will, which is the operation of Girard College.*"

In that case Judge BOLGER said, inter alia: "These restraints upon alienation were advanced against the validity of the will in Philadelphia v. Heirs of Stephen Girard, 45 Pa. 9, (1863), wherein the court held that they did not affect the validity of the trust, since they applied only to the mode of administration.* In re Application of the City of Philadelphia, 2 Brewster 462, the court authorized leases of coal lands for 15 years, pointing out that no tenants could be obtained for a less period, and therefore the trust purposes would be gravely endangered if the five-year limitation prevailed.* The court held that the doctrine applied, . . . It is clear to us that this is added reason why the foregoing legislation must be interpreted in the light of the cy pres doctrine, and therefore, we must find that *the retention of the real estate*, the subject matter of the instant petition, *has become incompatible with the maintenance and development of Girard College, which is clearly the dominant purpose of the trust.* . . . The various appellate decisions and the decrees of this court in dealing with the problems which have arisen in the interpretation of the will of Stephen Girard, and in the administration of the trust, *are unanimous in finding that the primary object of testator* was the founding and perpetuation of the institution which we now know as Girard College."

All of the foregoing cases as well as the actions of the City itself make clear beyond the peradventure of a doubt that there is absolutely no merit in appellants' contentions that Girard College is City property owned by it in its gov-

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* These cases and others herein cited hold that permission to lease or sell land contrary to testamentary directions gives the Court no right to invalidate or pervert or destroy the clearly expressed primary object and purpose of testator's Will, viz., an orphanage establishment for "poor white male orphans."

ernmental capacity, or that the City was the primary object of testator's bounty, or that the City could, in its governmental capacity or otherwise, divert the trust property to any public purpose or use it desired, or that it could rewrite testator's will in a manner and for a purpose diametrically different from the primary objects he so clearly specified.

It is, we repeat, impossible to read Girard's Will without being convinced that the primary object of his heart and soul and bounty was the construction and maintenance of an orphan establishment now known as Girard College —a home, college and orphanage for "poor white male orphans". It is a great and wonderful charitable trust which has been repeatedly sustained by the Supreme Court of the United States and by the Supreme Court of Pennsylvania and by the lower Courts of Pennsylvania for over one hundred years — it should not now be perverted or destroyed unless recent decisions of the Supreme Court clearly compel such a change.

Recent Decisions of the Supreme Court

The final contention made by appellants is that Girard's charitable trust for "poor white male orphans" violates the Fourteenth Amendment to the Constitution of the United States and therefore can no longer be carried out. The Fourteenth Amendment (Section 1) provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall* make or enforce any law which shall abridge the privileges or immunities of citzens of the United States; *nor shall any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The cases on which appellants mainly rely to support this contention are *Brown et al. v. Board of Education*, 347 U.S. 483; *Bolling et al. v. Sharpe et al.*, 347 U. S. 497;

Barrows v. Jackson, 346 U. S. 249; and *Shelley et al. v. Kraemer et al.*, 334 U. S. 1. These are factually very different from the instant case and do not control it. In the *Brown* case and its companion case, the *Bolling* case, the issue was the right of colored boys to attend a public school on an integrated basis with white students. The Court held that a segregated colored school was a violation of the Fourteenth Amendment and required public schools to be on an integrated basis. In the *Bolling* case the same principle was applied to the Federal Government under the Fifth Amendment. In those cases the public schools were, as their name implied, public schools founded and maintained and paid for by the State or by the Federal Government or by one of their (respective) agents out of public funds, namely, taxes or other public money. Neither those decisions, nor any other decision, nor the Fourteenth Amendment provide that a private individual cannot leave his money for a church or charity of his choice, or for a private school or for an orphanage for white persons or for any sectarian purpose. Cf. *Booker v. Grand Rapids Medical College*, 156 Mich. 97; 10 Am. Jur. §516, p. 10; 56 C. J. §§1-3; 78 C. J. S. §§1-3; 11, 47 Am. Jur. §220.

In *Pierce v. Hill Military Academy*, 268 U. S. 510, the Court held that the State cannot, under its police power, deprive citizens of the right to establish private schools, or deprive parents of the right to have their children attend private schools, or compel parents to have their children attend public schools. Such a statute, the Court said, would be a violation of the Fourteenth Amendment. This was reiterated in *Connell v. Kennett Township*, 356 Pa. 585, 52 A. 2d 645; *Commonwealth ex rel. School District of Pittsburgh v. Bey*, 166 Pa. Superior Ct. 136, 70 A. 2d 693; *Commonwealth v. Beiler*, 168 Pa. Superior Ct. 462, 79 A. 2d 134.

The *Brown* and the *Bolling* cases, we repeat, dealt only with public schools owned and operated with taxpayers' money and did not purport to hold that a private

school for white persons or a private charity or a sectarian church was or would be a violation of the Fourteenth Amendment. They are therefore clearly distinguishable.

In *Buchanan v. Warley*, 245 U. S. 60, a *City Ordinance* which forbade colored persons to occupy houses as residences in blocks where the greater number of houses were occupied by white persons, was declared unconstitutional as a violation of the Fourteenth Amendment. This is clearly distinguished from the instant case because that was State or City action.

In *Corrigan v. Buckley*, 271 U. S. 323, plaintiff brought a suit in equity to enjoin the conveyance of certain real estate to a colored man in violation of an agreement between plaintiff and defendant and other landowners not to sell to any person of negro race or blood. The Supreme Court said (pp. 329-330):

"Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill, is 'void' in that it is contrary to and forbidden by the Fifth, Thirteenth and Fourteenth Amendments. *This contention is entirely lacking in substance or color of merit.** The Fifth Amendment 'is a limitation only upon the powers of the General Government,' Talton v. Mayes, 163 U. S. 376, 382, and is not directed against the action of individuals. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matetrs protect the individual rights of persons of the negro race. Hodge v. United States, 203 U. S. 1, 16, 18. And the prohibitions of the Fourteenth Amendment '*have reference to state action exclusively, and not to any action of private individuals.*' Virgina v. Rives, 100 U. S. 313, 318; United States v. Harris, 106 U. S. 629, 639. 'It is State action of a particular character that is prohibited. *Individual invasion of individual rights is not*

* Italics throughout, ours.

the subject-matter of the Amendment.' Civil Rights Cases, 109 U. S. 3, 11. *It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property;* and there is no color whatever for the contention that they rendered the indenture void."

The *Corrigan* case has been cited with approval many times by the Supreme Court of the United States. However, in the recent case of *Shelley v. Kraemer*, 334 U. S. 1, the Court emphasized the point that *Corrigan v. Buckley*, 271 U. S., supra, did not decide whether the restrictive covenants could be judicially enforced, but only whether they were valid and "since the inhibitions of the constitutional provisions invoked apply only to governmental action as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid." Again in *Hurd v. Hodge*, 334 U. S. 24, the Court emphasized that *Corrigan v. Buckley*, 271 U. S., supra, concerned "the validity of the restrictive agreement standing alone", while the *Shelley v. Kraemer* and *Hurd v. Hodge* cases concerned the "validity of Court enforcement of the restrictive covenants".

In *Shelley v. Kraemer*, 334 U. S., supra, the Court held that a colored man had a constitutional right to purchase and occupy property and that a racially restricted real estate covenant could not be enforced by the State Courts because it amounted to a denial by the State or its officers of the equal protection of the laws in violation of the Fourteenth Amendment. *The Court pointed out, however, that the constitutional provision was only a prohibition against the States and not against individual citizens.* The Court, speaking through Chief Justice VINSON, said: "Since the decision of this Court in the Civil Rights cases, 109 U. S. 3, the principle has become firmly embedded in our constitutional law that the action inhibited

by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*

"*We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendments.* So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."

The City in this case is not acting as a sovereign or as an agency of or for the State; if it is acting at all, it is acting, we repeat, *as trustee under a will of a private citizen.* The property involved is the property, not of the City or the State; it is the property of the Stephen Girard Estate and it is Girard's charity and benevolence and his will, not the charity or benevolence of the City or State, that alone is involved in this case. The Courts are not acting as an agency of the City or State to deprive these applicants of any constitutional rights—the applicants are the ones who are seeking State action in their behalf to invalidate a private Will in which they are not beneficiaries. This is the converse of *Shelley v. Kraemer* and would seem to be a matter completely outside of the Fourteenth Amendment.

Private trusts for charitable purposes, of which there are a myriad, have been sustained as valid by the Supreme Court of the United States and by the Courts of every State, particularly Pennsylvania, even where the class of beneficiaries was limited to racial or religious groups. Such charitable trusts are still valid and constitutional unless State or City action (or an agency thereof) deprives persons excluded from the charity, of their constitutional rights.

This Charitable Trust Will Not Be Permitted to Fail Merely Because the City Does Not Desire to Or Cannot Legally Act As Trustee

It is hornbook law that the Orphans' Court has the inherent power to remove a trustee and to appoint a new or substitute trustee, in order to protect or preserve the trust. If the City of Philadelphia does not wish to act as trustee in this charitable estate or if for constitutional or other reasons it cannot carry out the trust for Girard College in accordance with Girard's clearly expressed purpose and his specific, as well as his dominant, testamentary intent—this would not void the trust or change it into a bequest to the City in its governmental capacity. Such a situation would merely require that a new or substitute (corporate) trustee should be appointed by the Orphans' Court, which can lawfully carry out the above mentioned trust for Girard College: *Vidal v. Girard's Executors*, 43 U. S. 127; *Girard v. Philadelphia*, 74 U. S. 1; *Bangor Park Association Case*, 370 Pa. 442, 88 A. 2d 769; *Jordan's Estate*, 329 Pa. 427, 197 A. 150; *Abel v. Girard Trust Co.*, 365 Pa. 34, 73 A. 2d 682.

Effect of City's Contentions

If the present contention of the City is correct, its effect will be catastrophic on testamentary church and charitable bequests, as well as on the law of Wills in Pennsylvania. The constitutional prohibition against discrimination—the Fourteenth Amendment—is not confined to color; *it prohibits the States* from making any discrimination because of race, creed or color. It follows logically and necessarily that if an individual cannot constitutionally leave his money to an orphanage or to a private home and college for poor white male orphans, he cannot constitutionally leave his money to a Catholic, or Episcopal, or Baptist, or Methodist, or Lutheran or Presbyterian

Church; or to a Synagogue for Orthodox Jews; or to a named Catholic Church or to a named Catholic priest for Masses for the repose of his soul, or for other religious or charitable purposes. That would shock the people of Pennsylvania and the people of the United States more than a terrible earthquake or a large atomic bomb.

We adopt what Judge LEFEVER, speaking for a unanimous six-man Orphans' Court of Philadelphia County, so well said: " 'The most solemn act of a man's life, which is consummated by his death, is his last will and testament. By that act he makes a law for the disposition of his own property, acquired by his own industry, which, if it does not contradict the law of the country, has hitherto been considered inviolate. Shall it be so considered no longer in Pennsylvania?' The Supreme Court of Pennsylvania answered 'No' to this interrogatory and declared unconstitutional an Act of Assembly which attempted to vary the terms of testator's will in setting up an orphanage.

". . . Significantly, he [Girard] did not specify any color limitation in the latter two gifts. Therefore, it is clear that he intended white, and no other, in the privotal phrase now before us, viz: 'poor white male orphans', and that he knew how to say white when he meant white.

". . . There is no shortage of 'poor white male orphans'. In fact, there are more qualified applicants than can be accepted and accommodated. There is, therefore, no present failure of the purpose of the trust; a fortiori, there is no ground for the application of the cy pres doctrine. . . .

"The fallacy in exceptants' position is their contention that Girard College should be regarded as a public school. It is not. Girard College is a private school. It is more than that—in Stephen Girard's own words it is an 'Orphan establishment', where the objects of testator's bounty receive not only an education but also lodging, board, clothing and all of the necessities of life. The trust estate was created solely from the private property of Girard. Girard

College was not established and it has never been operated at public expense. Every dollar expended for construction, maintenance and operation of Girard College and for the education, maintenance and support of the students has come, and must come, from Girard's estate. Not one penny of the trust estate has come from the City of Philadelphia, from the Commonwealth of Pennsylvania, [or] from any other governmental body, [or] nor from any source other than Stephen Girard. This privately established, privately financed, and privately maintained 'Orphan establishment' *cannot be equated* to a publicly financed and publicly maintained school."

DISSENTING OPINION BY MR. JUSTICE MUSMANNO:

Stephen Girard, the testator whose last will and testament is the subject of controversy in this lawsuit, was born in Bordeaux, France, on May 21, 1750. At the age of 14, he, like his father who was a mariner, took to the sea and made several voyages to the West Indies. When only 23, he became a duly licensed ship's captain, and sailed into many ports of the world. He first touched at American soil (San Domingo) in February, 1774, and in July of that year brought his ship for the first time to a North American continental port (New York). Then in May, 1777, he entered the waters of the Delaware and dropped anchor off Philadelphia's shores. He was never again to return to his original homeland. He rented a store on Water Street of that city and entered into business.

The shifting fates of the Revolutionary War, with the invasion and occupation of Philadelphia by British troops, drove him from the city on occasion but he always rturned to Water Street. In this neighborhood, with the exception of a voyage to Charleston and the Mediterranean, in a brig owned and commanded by himself, and which terminated in July, 1788, Stephen Girard from then on lived and died a citizen of Philadelphia which he admired

and venerated with an ardor which often surpasses the devotion of native sons. During the epidemic of the yellow fever in 1793 and again in 1797-8, Stephen Girard aided the sick, comforted the dying, and made liberal contributions to the funds required in fighting the ravages of the pestilence which gripped Philadelphia in a threatening catastrophe. For his benevolent services in these trying periods of the city's history he was honored by his fellow-citizens with testimonial and public laudation.

In 1802 Stephen Girard was elected a member of the Philadelphia "city councils." He had now entered the banking field in which he prospered so signally that upon the expiration of the charter of the first Bank of the United States he took over the building theretofore occupied by that institution, named it the Bank of Stephen Girard, and developed it into one of the foremost financial institutions of the country.

For a period of upwards forty years, although engaged in a most extensive commerce, and the owner of numerous vessels employed in a very large foreign trade, Stephen Girard devoted most of his time to banking pursuits, varied by visits to his farm in Passyunk. As stated by Justice READ in his Opinion in the case of *Soohan v. City of Philadelphia*, 33 Pa. 9, from which most of this short biographical sketch is drawn, although Stephen Girard enjoyed a "reputation extending over the United States and Europe, as a wealthy and successful merchant and banker, his habits were so retired, plain, and frugal, that his person was unknown to many of his fellow-citizens. His fame and his name are indissolubly connected with the great charity which created the subject of this dispute—his "orphan college." Another dispute over the "orphan college" has now, almost a century later, arisen and it is before this Court for decision.

In the year 1830, fully aware that the sands of life were running fast and that but few grains were left him to enjoy, having now reached his 80th birthday,

Stephen Girard called in his lawyer and prepared to dispose, by will, of the enormous wealth, which his innate ability and shrewd foresight, cooperating with providential circumstance, had amassed. For several weeks the testator and scrivener toiled together and by February 16, 1830, there came to light a document of 35 pages which, through litigation, commentary, and application to the works announced therein, has inspired tens of thousands of pages of writing. In this document which disposed of his riches, Stephen Girard was just and generous to relatives who would survive his death, but he stopped short of the thought that they merited the lion's share of his financial empire. An avid reader of Voltaire's writings and other philosophical works, he believed that one's own community and mankind itself deserved a place in the sunshine of the good fortune which had blessed him in the gilded days of his profitable career. Thus, he bestowed on the City of Philadelphia and its people gifts which were more reminiscent of the largesse of a rich, benevolent city father than the munificence of a private citizen. For instance, he set aside funds with which to establish a competent police force, he bequeathed money for the gargantuan task of removing wooden buildings from the limits of the city, he provided for the paving and widening of certain streets, he supplied means for cleaning and keeping clean the city's docks on the Delaware, and redistribution of the waters of the Schuylkill River within the city limits. He made available facilities to "improve the city property, and the general appearance of the city itself; and, in effect to diminish the burden of taxation, now most oppressive especially on those, who are the least able to bear it."

If anyone was entitled to be called "Mr. Philadelphia" in those days, it was Stephen Girard. In addition to the legacies above enumerated, he opened the flood of his generosity to such institutions as the Philadelphia Hospital, the Pennsylvania Institution for the Deaf and Dumb, the

Orphan Asylum of Philadelphia, and various other organizations for relief of the poor and the distressed.

Grateful to the city which had made him rich, Girard was not unmindful of the opportunities afforded by a State government which allowed amplitude to the unfoldment of his business genius. Thus he bequeathed $300,000 to the Commonwealth of Pennsylvania for purposes of internal improvement by canal investigation.

While all these bequests evinced a warm disposition toward physically improving his city, bettering the general welfare of the people, and mitigating the hardships of the unfortunate, proving the truth of his statement that he had "sincerely at heart the welfare of the city of Philadelphia,"—what was even closer to his heart was the desire to aid in "educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance they are exposed". Towards the accomplishment of this desire he set aside $2,000,000 to provide "for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds".

In Clause XX of his will he stated: "Now, I do give devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind and wheresoever situate . . . unto 'The Mayor, Aldermen and citizens of Philadelphia their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned' ".

In Clause XXI he provided: "And so far as regards the residue of my personal estate, in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary—in erecting . . ." and maintaining the college which he described in the minutest of detail as to construction, architecture, furnishing, the

employment of instructors, the feeding and the clothing of students. As a man of the sea, he could not, with more particularity, have prepared for the construction, maintenance, care, and navigation of a ship, than he directed as to what was to be done to launch his college for orphans. However, before the keel of this vessel of education could be laid, he required that the State do certain things—many things.

Stephen Girard was obviously aware that the enormous project of building a college, selecting and maintaining its students, hiring and paying for instructors, and increasing its capacity, *always on a non-paying student basis*, was one which called for the intervention of the State. However, as appreciative as he was of what the State and City had offered him in the way of opportunity, he was pragmatic enough to realize that even philanthropy calls for rigid organization and supervision. It also in some ways requires sanctions. The fond father who gives his child pennies if he will eat spinach is applying a principle which reflects human nature in even lofty and exalted enterprises. It will be recalled that Mr. Girard bequeathed $300,000 to the Commonwealth. This legacy was conditioned upon the Commonwealth's enactment of the legislation necessary to permit Philadelphia to perform the cleaning, building, paving and other operations he had outlined. Stephen Girard also provided that if the City of Philadelphia did not carry out his wishes with regard to the Girard College, the residue of his estate (the $2,000,000 and accumulations) would go to the Commonwealth of Pennsylvania for internal navigation; and if the Commonwealth of Pennsylvania failed to "apply this or the preceding bequest to the purposes before mentioned," the money in that event would pass to the United States for the purposes of internal navigation.

It is difficult to imagine a testamentary disposition more completely interwoven with the public's welfare and responsibilities than the Girard will, all of which renders

quite extraordinary the decision of this Court to the effect that the Girard College is simply a private institution. But that will be taken up later. Proceeding with our narrative of events, we arrive at the death of Stephen Girard on December 26, 1831, and the probating of his will on December 31, 1831.

Stephen Girard's will, as we have seen, envisioned a beautiful dream—a college for the education of the poor. But this dream would have died a-borning without State action. The General Assembly of the Commonwealth of Pennsylvania was required to act, and act within a year's time, if Philadelphia was to see one brick placed on top of another in the erection of Stephen Girard's temple of learning for poor children. The General Assembly lost no time in acting. On March 24, 1832, it passed an Act directing the constituted authorities of Philadelphia to carry into effect the will of Stephen Girard.

Less than a month later (on April 4, 1832) the General Assembly passed another Act providing that "the select and common council of the City of Philadelphia, shall be and they are hereby authorized to provide by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the last Stephen Girard."

Further State intervention was required before doors could be hung in the portals of Girard College. The Girard will stipulated that no orphan could be admitted unless some authoritative relative or "competent authority" guaranteed that the orphan would not be withdrawn from the school before termination of his studies. The Legislature, accordingly, on February 27, 1847, passed a Special Act making the City a guardian of every Girard College orphan and prohibiting interference from any relative. Paragraph 9 of Clause XXI of the Girard will provided that when the orphan students arrived at the age between 14 and 18 they were to be bound out by the City to suitable

occupations until they had attained the age of 21. The Act of February 27, 1847, authorized the City to bind out the orphans until they reached their majority.

A fourth Act was passed by the General Assembly on April 30, 1853, meeting another requirement of the Girard will, namely, that the City be allowed to bind Girard College orphans as apprentices.

So much was the Girard will a matter of public business that at Harrisburg a special committee was chosen and entitled: Select Committee of the Pennsylvania House of Representatives on the Estate of Stephen Girard. While the General Assembly was enacting legislation implementing the Girard will and supplying the legal equipment required to put the provisions of the will into effect, the City Councils of Philadelphia (Common and Select) were engaged in preparing for the erection of the college buildings. On March 21, 1833, the Philadelphia Council passed an ordinance providing for the construction of the school, entitling it the Girard College for Orphans, all building plans to be approved by Council. On July 14, 1836, an ordinance was adopted making provision for the purchase of books and paraphernalia. On January 28, 1841, the Council ordered that contracts entered into by the College had to be validated by Council. The Council appointed committees to handle the innumerable details connected with maintaining, creating, and running a college.

The cornerstone of the institution was laid on July 4, 1832, and it was officially opened for student occupation on January 1, 1848. On November 9, 1848, Council appointed a visitation committee to visit the college once a month and report on its findings to Council. That the Girard College was an object of continuous solicitude, care, and managership on the part of the City fathers is evidenced by the fact that between September 15, 1832 and December 18, 1869, the Council enacted 48 different ordinances devoted exclusively to the Girard College.

In 1869 the management and direction of Girard Col-

lege was placed in the hands of a Board of Directors of City Trustees, created by the General Assembly (Act of June 30, 1869, P. L. 1276). This Board (hereinafter called the Board of City Trustess) was composed of the Mayor, the presidents of the Select and Common Councils, and 12 other citizens to be appointed by the Court of Common Pleas of Philadelphia County. That Board is the governing body of Girard College today, admininsters the trust in all its ramifying particulars and selects the student body. The Treasurer of the City of Philadelphia serves as the Treasurer of the Board. Through this Board and through periodical examinations, visits, and audits the General Assembly maintains a direct supervision over the College and its activities. The Board is required to report annually to the City Council, to the State Legislature, and to the Court of Common Pleas, publishing its reports in the Philadelphia newspapers. The City Controller is required to audit the accounts. The Act makes the members of the Board city officers.

We have related how Stephen Girard declared in his will that the student body of Girard College was to be made up of "poor white male orphans." On February 1, 1954, William Ashe Foust and Robert Felder, two Negro fatherless boys, aged 8 and 7 years respectively, applied for admission to the Girard College, but were refused enrollment by the Board of City Trusts. In refusing the admission, the Board stated that it had been "advised by its solicitor that it has no power to admit other than white boys to Girard College".

On September 24, 1954, the rejected Negro applicants and the City of Philadelphia, acting through the Mayor and the Commission on Human Relations, filed separate petitions in the Orphans' Court of Philadelphia County for a citation upon the Board to show cause why the applicants should not be admitted. The Board admitted in its answer that the applicants had been denied admission solely on the basis of race. After hearing, the Court below upheld the

action of the Board and the applicants appealed to this Court. Since the Commonwealth of Pennsylvania was named the remainderman under the will of Stephen Girard, the Attorney General of the Commonwealth intervened to protect its rights as remainderman as well as its rights as parens patriae to supervise and enforce the provisions of a charitable trust. The Commonwealth upholds the position of the applicants that the Girard trust is a public charitable trust and as such is controlled by the Fourteenth Amendment. The City of Philadelphia, through the City Solicitor's office, takes the same position.

At the oral argument before this Court the Commonwealth, the City, the applicants, and the Board of Directors were all represented by able counsel who also filed informative briefs. The Court took the case under advisement and the Majority has now affirmed the decision of the lower Court. In its Opinion the Majority well stated the issue brought before us for decision:

"The question then, is whether the limitation in Girard's will to white children as the beneficiaries of his college or orphange, although undoubtedly lawful at the time of the execution of his will and of his death, has become invalid as a result of the adoption of the Fourteenth Amendment which prohibited any State from denying to any person within its jurisdiction the equal protection of the laws. No such question could possibly arise in the case of a private charitable trust for the Fourteenth Amendment applies only to agencies of the State or of a municipality within the State; it is directed solely against State, not individual, action."

Is then the action of the Board of City Trusts an action of the State? The Supreme Court of the United States said in the case of *Ex Parte Virginia*, 100 U. S. 339, 347, that when one "acts in the name of and for the State, and is clothed with the State's power, his act is that of the State." How can there be any doubt that the State of Pennsylvania speaks in the administration of the Girard trust?

We have seen the State passing five different statutes devoted to the Girard trust. We have witnessed the State setting up the machinery for running the Girard College. We have noted that the House of Representatives formed a special committee to consider the Girard estate. And it must particularly be observed and emphasized that the State's concern for the Girard trust is not a matter of past tense. It *today* expresses a direct supervision over the administration of Girard College. Members of the Legislature visit it officially. The City of Philadelphia is required to submit periodical reports on the College to the Legislature. The accounts of the College are open to the State's inspection.

It is a matter of no little weight in determining whether the Girard trust is a public or private charity to note that the City itself makes no effort to conceal the governmental character of its involvement in the direct management of the College. The rejection by the Board of City Trusts of the applications of Felder and Foust was written on official stationery of the City bearing in large type the words CITY OF PHILADELPHIA.

How can it be doubted that in creating the Board of City Trusts the General Assembly intended to bring into being a governmental agency? The enabling Act provided that all duties, rights and powers of the City of Philadelphia with respect to property dedicated to charitable uses or trusts are to be discharged by the City "through the instrumentality of a Board composed of fifteen persons including *the mayor of said city, the presidents*," *etc.*, "who shall exercise and discharge *all the duties and powers of said city*. . . ." The Board is directed "*in the name of the . . . City . . .* to make all necessary agreements", and "for and *in the name of the said City* to do, perform and discharge," all necessary acts in the discharge of the trust. And then, as if to eliminate the possibility of questions in the future as to the authority of the Board, the Act specifically declares that "The said directors, in the discharge

of their duties, and within the scope of their powers aforesaid, *shall be considered agents or officers of said city . . .*"*

The State could have refused to accept, had it chosen to do so, the largesse of Stephen Girard, but it did not so refuse. On the contrary, it eagerly and enthusiastically accepted every proposition advanced by Mr. Girard in his will. The testator spelled it out clearly that if the State was to receive the $300,000 he bequeathed to it, it had to enact certain enabling laws. By accepting the legacy and by passing the requested legislation the State has entered into a contractual obligation which it cannot ignore.

The Majority of the Court seems to have difficulty in finding that the Girard College is a public institution. The job, as I see it, is not how to find that the Girard College is a public charity, but to ascertain by what processes of search, reasoning, and logic it is possible to declare it is a private charity. With the exception of the fact that Stephen Girard originally supplied the funds for the founding of the institution there is not one item in the whole 125-year history of Girard College to support the contention that it is a private institution. The $2,000,000 originally bequeathed for the college was exhausted with the final construction of the buildings. Had it not been for the able managership of the City of Philadelphia and the guiding hand of the State of Pennsylvania, the Girard College would most likely have remained a group of empty buildings unenlivened by the shouts of happy children within. Because of the pains taken, the time spent, and the wisdom exercised by the City of Philadelphia acting through its designated officials, the Girard estate, after a perilous escape from a near-foundering, has sailed on to fortune, having now an appraised value of $98,000,000. Its real property alone is worth over $10,000,000. And it must not be overlooked in this connection that the Girard estate did not have to pay commissions on income and capital gains,

* Italics throughout, mine.

which it most assuredly would have had to do if the trustees had been private trustees instead of governmental agencies.

Stephen Girard planned well. He knew that without the power, the authority, and the ceaseless supervision of the State, it would have been impossbile to crystallize into reality his cherished hopes for a college for non-paying poor children. If, by some dreadful retroactive cataclysm, there would fall out of present reality, all the governmental authority, direction, control, and guardianship which have gone into the Girard College for the last 125 years, the college would today be but a withered dream hanging disconsolately on the melancholy vine of unrealized hopes.

The only question in this case is whether the Girard College is a public institution. If it is, it cannot avoid the Fourteenth Amendment and it must therefore admit the applicants in this case. Instead of considering this issue, which the Majority itself has pointed out, the Majority goes on to discuss at great length a matter that is not in dispute at all, namely, that a testator has the right to leave his property to whomsoever he wishes. Certainly a testator is entitled to choose the beneficiaries of his bounty, but if he asks the government to administer his estate he cannot expect the government to ignore the very law it symbolizes. Parents who consent to have their child adopted by others cannot complain if the adopting parents, raising him in another state, follow the law of that State instead of the law of the State in which he was born. If a testator should today leave his property in trust to the State for the training of destructive atom bomb engineers, and then later on the destructive atom bomb should be proscribed; the government could not be compelled to go on instructing students in a sphere of education beyond the pale of the law.

In 1870, this Court had before it for consideration the Act of June 30, 1869, P. L. 1276, which created the Board of Directors of City Trusts. Referring to that case the Majority Opinion says: "The Act was upheld as to its validity in Philadelphia v. Fox, 64 Pa. 169, where the

policy it represented was described (p. 183) as 'having such a board dissociated from the general government of the ctiy'". But the Majority only released part of the quotation. The whole passage reads as follows: "We have nothing to do with the wisdom of the measure—with the policy of having such a board dissociated from the general government of the city, or with the mode of its selection. Those are questions exclusively for the legislature. No one I think can doubt that it was entirely competent for that authority to vest the entire management and control of all municipal affairs in just such a body as that constituted by this act. If they could do the greater, they can do the less. They could make a similar provision for any other department of the municipality. They might establish a board of police, of highways, of sewerage, of cleansing." It will be seen that in the *Fox* case the Court equated the Board of City Trusts with a municipal board of police or a board of highways. How can one fail to see that when the Court there spoke of a board "dissociated from the general government," it meant something dissociated from sovereign authority? If it had meant what the Majority here wants to try to have it mean, the Court would never have included a board of police as an illustration because a board of police is certainly part of the municipal government.

The Majority picked up from the *Fox* case a mere fragment and then dropped it. If it had lingered a little longer in discussion with that epochal decision, it might have concluded that in reality it is decisive of the question before us. For instance, Justice SHARSWOOD, who wrote the decision, said: "Such a municipal corporation may be a trustee, under the grant or will of an individual or private corporation, but *only* as it seems *for public purposes, germane to its objects*. . . . I am aware that it has been said by high authority in England that it may take and hold in trust for purposes altogether private. . . . But the administration of such trusts, and the consequent liabilities

incurred, are altogether inconsistent with the public duties imposed upon the municipality." If this Court follows the *Fox* case, and it is bound to do so since the Majority cites it favorably, it cannot possibly declare the Board of City Trusts to be engaged in administering a private trust. A municipal corporation, as Justice SHARSWOOD stressed, may only be a trustee where the grant has to do with *a public purpose*, germane to the object of the corporation. Justice SHARSWOOD said further: "When, therefore, the donors or testators of these charitable funds granted or devised them in trust to the municipality, they must be held to have done so with the full knowledge that their trustee so selected was a mere *creature of the state, an agent acting under a revocable power.* . . . It is surely not competent for a mere municipal organization, which is made a trustee of a charity, to set up a vested right in that character to maintain such organization in the form in which it existed when the trust was created, and thereby prevent the state from changing it as the public interests may require".

It is obvious from the above that the City of Philadelphia, as a branch of the State government, cannot entertain a right which would prevent the State from changing it as public interests may require, for instance, as the Fourteenth Amendment requires.

Counsel for the applicants put it very well in their brief when they say: "If Girard had been able to set up and maintain Girard College in the manner described in his Will without any special state and municipal legislation, and without the use of public officials, we might be dealing with the situation envisioned by the Orphans' Court, to wit: purely private arrangements enforced and observed without any State action. But this was not the case." Indeed it was not the case. As already pointed out, in effectuating the objectives of his will, Stephen Girard called on the Legislature of Pennsylvania, the City Council of Philadelphia, the Mayor of Philadelphia, and the Treasurer of Philadelphia. Then the General Assembly of the

Commonwealth added for his benefit the services of the judges of the Courts of Common Pleas (now 21) in appointing the Board of City Trusts administering his estate. If such a plethora of governmental activity does not make Girard's trust a public trust, then the word "public" has undergone a mysterious transformation which is not recorded in the dictionaries of the English language or the lexicon of the law.

Counsel for the Board of City Trusts in their brief tell how the $2,000,000 set aside for the erection of the college was not sufficient for the purpose because of a great depreciation in the value of some of the investments due to the financial panic of 1837. After this statement, counsel go on to make this significant declaration: "Not only was there a depreciation in the value of some of the investments, and consequently insufficient revenue for the completion of the buildings of the college (Soohan v. City, 33 Pa. at page 23), but the Councils used income from the Girard Estate for *municipal purposes other than the College*, amounting to $571,958.42, in the years 1833 to 1848 inclusive". Is it necessary to expatiate on that disclosure? "Councils used incomes from the Girard Estate for municipal purposes!" Incidentally these revealing statistics are drawn from the Report by Hon. George Wharton Pepper, Auditor.

The Majority attempts to draw a distinction between the City of Philadelphia and the Board of City Trusts, in spite of the fact that the Board of City Trusts has in the very heart of its organization the chief executive officer of the city, the Mayor; and its chief financial officer, the Treasurer. In support of its strange conclusion the Majority says that the fact the Board filed an answer to the City's petition is evidence of "the complete severance between the city in its ordinary municipal or governmental capacity and the Board of Directors of City Trusts administering the trusts confided to the city as trustee." But the action of the Board in this respect is merely self-serving. It is not

the first time in the history of government that a subsidiary body presumes to question the authority of its parent body.

If the bland affirmation of the Board makes the Board something removed from the City, then the whole present litigation is moot, and this Court is engaged in static academic philosophizing. But it is not enough for the Board to say that it forms no part of the City. This is something it must prove and I submit it can no more prove such severance than the tentacle of any invertebrate can, by mere assertion, make itself independent of the body from which it draws life. While not of any great importance, it is a matter of human interest at least to point out that the attorneys for the Board, in a moment of factual realism, detached from the part they are enacting in this litigation, referred to themselves as "Attorneys for the City of Philadelphia". On the cover of their brief they sign themselves: "*Attorneys for The City of Philadelphia*, Trustee Under the Will of Stephen Girard, Deceased, Acting by the Board of Directors of City Trusts."

In their brief the Board attorneys concede that the Board is a governmental agency but maintain it does not act as a governmental body. But if it is a creature of the law, which it is, it must respond to the law, and, acting according to the law, it cannot possibly ignore the provisions of the Fourteenth Amendment.

The Board's attorneys state further in their brief: "No one doubts that the Board is an agent of the City, but the City and the Board together are agents of Stephen Girard to carry out the terms of the will." But can the City be the agent of a private individual? The City may no more be an agent of a deceased citizen than it can do the bidding of a living private person. Our whole democratic form of government is founded on the proposition that public officials have but one master and that is the public.

In contending for their position the attorneys for the Board argue that it is not the State or the City which offers

educational facilities of Girard College to anyone, but that it is Stephen Girard who does so on his own terms. And then the writer of the Board's brief enunciates in epigram and in italics: *"Since the State offers nothing to anyone, it can scarcely be said to deny something to someone."* But one could reply with an equal economy of language to this apothegm by saying that: In the exercise of its sovereign powers the State offers all opportunities to everybody, and when it denies anything to anybody it denies something to everybody.

The Majority Opinion makes reference to the Philadelphia City Charter and seems to find therein support for its thesis by declaring that the Charter says it does not apply to the Board of City Trusts. However, it seems to me that this exclusion does not mean that the Board is any less governmental. On the contrary, it could mean just the reverse because the Board, being a distinct creature of the Legislature, is under the control of the Legislature and must, as we have seen, report to the Legislature as well as to the City.

In the case of *Girard's Appeal*, 4 Pennypacker 347, 361, this Court specifically stated that "the directors of city trusts are *a department of the municipality* which the Legislature had a constitutional right to establish." This Court said further in that case: "A man who constitutes such a municipality his trustees, does so subject to all the changes which the sovereign power may make in its character and organization." Thus, it is futile to reason that the Board of City Trusts has no power to do anything which seems to be in opposition to the testator's words. The Board, being a child of the Legislature, is a public agency and, regardless of apparent prohibition in the provisions of the trust document it is carrying out, cannot avoid enforcing the law of the State which is its master.

The Majority introduces the statement that the City is administering some 89 charitable trusts at this time. I do not know what are the provisions of these trusts, nor

do I think the Majority knows either. In any event it is entirely irrelevant to speak of these other 88 trusts, for it is safe to assume that not one of them is so interlocked with the State and City as is the Girard trust. And it is not unfair to assume, since the matter has not been called to our attention, that none of those trusts contains provisions in opposition to the Fourteenth Amendment.

The Majority advances the idea that if the Board of City Trusts is engaged in "State action", the petitioners would still not be entitled to the remedy they seek because the Orphans' Court could appoint another trustee. The Girard will provides in Article XXIV that if the City wilfully and knowingly violates any of the conditions in the will, the remainder and accumulations will go to the Commonwealth of Pennsylvania. The Majority seems to be of the impression that the college could go on operating just the same even if it were deprived of these enormous resources because it would always have the income from the real estate. But there is no evidence whatsoever that with the City withdrawn from the administration, and the remainder and accumulations paid over to the Commonwealth, the Girard College could continue with the large student body it now accommodates, if indeed it could live at all. The Majority feels that it could, and says that on this point the testator "speaks from the grave." Being dead since 1831, I would think that on all points the testator speaks from the grave,—and that on all points it is clear that Stephen Girard's primary objective was to dedicate his entire estate to the public in one form or another. In paragraph 9 of Article XXI, he said: "In relation to the organization of the college and its appendages, I leave, necessarily, many details to *the Mayor, Aldermen and citizens of Philadelphia and their successors;* and I do so, with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia will, observe and evince especial

care and anxiety *in selecting members for their City Councils and other agents*".

The polar star of Stephen Girard's entire testamentary disposition was the welfare of Philadelphia. He specifically provided for municipal improvements, assistance to charitable institutions, and education for children, all objects of governmental concern.

The lower Court, in affirming the rejection by the Board of City Trusts, emphasizes that Stephen Girard made it very clear that the students for Girard College were to be limited to "poor white male orphans," and that since the language was very specific, there was therefore no need of interpretation or construction. The Court highly praised the unequivocality of Girard's language: "Among the outstanding characteristics of this will is the meticulous use of plain, unequivocal and unambiguous language. A reading of the will, from its beginning to end, leaves no doubt that Girard knew exactly what he intended, and expressed his many intentions with clarity and simplicity."

Because of this clarity and simplicity the Court resolved that no canons of construction are to be used, that the words in Girard's will mean what they say and nothing else, and must therefore not be altered to mean something else. The fact, however, remains that various words and phrases in Girard's will have been interpreted to conclude something different from their literal purport. In all verity, in at least one instance, the interpretation was made to mean exactly the antithesis of the plain declaration of the language. Stephen Girard specifically announced in Article XX of his will: "So far as regards my real estate in Pennsylvania, in trust, that *no part thereof* shall ever be sold or alienated". But real estate belonging to the Girard estate has been sold. The Majority Opinion here, in affirming the lower Court's Opinion, seeks to explain this diametrical defiance of Mr. Girard's specific request by saying: "It is true that there were some sales made under the authority of the Orphans' Court but only because the in-

come of the trust had shrunk to a point where the college could not be efficiently maintained and therefore the sales were the only recourse open in order to preserve the purposes of the trust; this was purely an administrative matter, sanctioned by law". This may explain away for the Majority the alteration in the will, but it cannot be denied that the will was made to say something which Mr. Girard did not say.

Stephen Girard also declared that the terms of leases of his real estate were not to exceed 5 years. Despite this precise limitation of 5 years, the Board of City Trusts has, under the authortiy of the Court, executed leases for 15 years. The Majority also excuses this change with the remark that it was impossible "to secure good tenants on shorter term leases." But it cannot be gainsaid that liberties were taken with the plain, unequivocal, and unambiguous language of Stephen Girard.

It is strange that the Majority makes no reference to the most drastic change of all in Girard's will. If anything was made clear in the Girard will it was that he was creating a trust estate for the benefit of orphans. The question has arisen as to whether the term "orphan" should mean orphans regardless of race, but there can be no question that the beneficiaries had to be *orphans*, that is, children who have lost both father and mother. We know, however, that the Board of City Trusts admits to Girard College fatherless children who have living mothers.

Webster's Unabridged International Dictionary defines an orphan as: "A child bereaved by death of both father and mother, or less commonly of either parent—in the latter case, sometimes called half-orphan." But the Girard will did not speak of half-orphans. It spoke of orphans. In any event, if the word orphan is intended to include fatherless children, why does it not also embrace motherless children? Are children of 6 to 10 years in less need of a mother than a father? I believe that this Court in the case of *Soohan v. City of Philadelphia*, 33 Pa. 9, was

entirely justified in including fatherless children under the term *orphan* because it was interpreting the spirit of the Girard will which was directed toward taking care of children who were poor and in need of attention and care.

But if the word *orphan*, for reasons of benevolence and humanity, was to be enlarged to encompass children who have lost their father but not their mother, why did the interpretation not include those children who have lost a mother but still have their father? Charity should not strain at mere words nor walk on the stilts of syntax. Stephen Girard's primary objective was to befriend poor children without adequate care. Since this Court allowed Girard's meaning to break through the imprisoning syllabic walls of *orphan*, why did it then limit the freed meaning to fatherless children?

The Majority, quoting from the case of *Franklin's Administratrix v. City of Philadelphia*, 2 D. R. 435, said that despite various "onslaughts" on the Girard will, the Girard charity was left "fixed, firm and immovable as a rock." It has been shown, however, that the granitic stability of the will did not prevent a softening of its provisions to allow the sale of real estate, it did not hamper the augmenting from 5 to 15 years of leases, it did not interfere with the humanitarian enlargement of the term *orphan* to include children with a mother living. Why must it then remain implacable in the presence of the Fourteenth Amendment to the Constitution of the United States?

The Majority indicates that Girard's purpose in deeding his estate over to the City of Philadelphia as a perpetual trustee was due to the fact that there were no trust companies in existence at the time with facilities for perpetual administration. In this respect the Majority writes: "James G. Smith, in his book on 'Trust Companies in the United States,' speaks (p. 233) of the age-long 'search for a continuous trustee.'" But this does not say that the search was unsuccessful. There was an age-long search for a route to India also, but it was finally successful.

The full sentence, from which the Majority quotes five words, reads: "Another interesting example of this search for a continuous trustee is the board of trustees in charge of the Delaware General Loan Offices which were first established in 1759."

Seventy-one years were to pass, after 1759, before Stephen Girard sat down to compose his long will. In the meantime a continuous trustee was not the far-away Indian pearl suggested by the Majority. An advertisement in the New York Evening Post, August 6, 1822, of a corporation seeking trust business (and quoted in the same book cited by the Majority, p. 247), proclaimed: "The public will readily perceive, that the advantages of this company to *protect property* for the benefit of *infants* or *others*, are far greater than those of individual executors or other trustees, who are always liable to casualties. . . . By placing such property in the charge of this company, *who have continued succession*, there can be no danger whatever of any such casualties." (Italics in original advertisement)

In seeking to interpret Stephen Girard's intent in the matter just discussed, the Majority says: "If speculation were to be indulged in—" But why indulge in speculation when the 35-paged will of the testator demonstrates on almost every page that Girard wished the government to handle his estate because he was making the public his beneficiary and he particularly wished the government to stand behind his college? He desired a government trustee because he knew that government activities are more exposed to public scrutiny than private enterprises and that, under the spotlight of public attention, there would be less chance for corruption, inertia, and mismanagement to worm their way into the trust estate and eat out its substance. Girard was so determined that the whole project be governmental that he directed that if the City of Philadelphia failed to carry out his instructions, the Commonwealth of Pennsylvania would become the successor in title, and if the Commonwealth was also indifferent to its obli-

gations under the will, the estate would then become the property of the United States of America. What more could a person do to demonstrate the undeviating public character of the trust?

The Majority Opinion quotes over and over the line which is slightly revolting to me that a man's prejudices are part of his liberty. From a philosophical point of view I would say that a prejudiced person may have the right to hurt himself through the indulgence of his prejudices, but he has no right to affect the liberty of others. But be that as it may, no testator has the right to ask the government to do something which is prohibited by the Constitution. All this, however, is beside the point. There is no evidence that in writing his will, Stephen Girard was motivated by prejudice. In 1830 the Federal Constitution sanctioned slavery.

As evidence of Mr. Girard's lack of prejudice it is to be noted that although he forbade clergymen to enter the college he did not prohibit religious instruction in the college. Justice STORY in the famous case of *Vidal v. Philadelphia*, 43 U. S. 127, spoke to this subject as follows: "The Testator does not say that Christianity shall not be taught in the college. But only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college. Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation, in the College—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated?" In fact, Stephen Girard specifically declared in his will: "My desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow creatures, and a love of truth, sobriety and industry, *adopting at the same time such religious tenets as their matured reason may enable them to prefer.*"

Supporting the decision of the Board of Directors of City Trusts which excluded the applicants, the Majority argues: "Stephen Girard naturally must have realized that he could not create an institution large enough to furnish both sustenance and education to any and all the children of Philadelphia, Pennsylvania, New York and New Orleans who might desire to be admitted; he could provide for only a small minority of such children and accordingly he prescribed a method of selection as he had both a legal and moral right to do unless there were involved a violation of some affirmative provision of law." But this is an argument which crumbles at the slightest touch of logic. It cannot seriously be maintained that Stephen Girard himself could build a college large enough to house all the poor white orphan boys in Philadelphia, New York, and New Orleans. Even if he limited himself to the numbers suggested by the Majority, there would still be left countless numbers of boys that could not enjoy his limited fortune. Stephen Girard's restriction, therefore, was not based on the proposition of accommodating numbers of children to quantity of dollars. The limitation indicated was merely an expression of Mr. Girard's determination to help as many as he could on the thoroughfare of life, just as one might build a fountain along the road to refresh such travellers who came that way, without intending that the whole world should bend its steps toward that particular highway in order to obtain a draught of water.

The Majority Opinion quotes from the case of *Rice v. Sioux City Cemetery*, 349 U. S. 70, 72, that: "Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked." But it is specifically a State deprivation which is involved here. In administering the Girard trust, the Board of City Trusts is acting for the City of Philadelphia which is a branch of the State; and, by failing to invoke the Fourteenth Amendment, it is guilty of a State deprivation.

The Majority declares that "It is perfectly clear, therefore, that private trusts for charitable purposes, not being subject to or controlled by 'State Action,' are wholly beyond the orbit of the Fourteenth Amendment." But this assumes what the Majority has not established, what the lower Court has not established, and what the Board of City Trusts has not established, namely, that the Girard trust is a private trust for charitable purposes. On the contrary, it is impossible to conjure up a more obvious public trust than this one. It was baptized by the State, it was confirmed by the State, the State guided it by the hand in its infancy, and the State stands beside it today in direction, counsel, management, and supervision.

The Majority reasons further that: "Such trusts [private charitable trusts] abound in overwhelming numbers and there can be no question as to their legality however limited be the class of their beneficiaries or whatever be the nature or basis of their restrictions; charitable trusts for limited groups, whether racial or religious, are as valid as if for all the people of the world." But here the Majority shoots wide of the target. We are speaking here, not of private charitable trusts; we are speaking of public charitable trusts *administered by the government!* In every reference to the Girard charity trust, there must be added in assumed parentheses the limitation: Charitable Trust administered, controlled and directed by the State, which of course, makes the trust something quite different from the charity which the Majority is defending, but which needs no defense because it is not being attacked by anyone.

The Majority says that: "We have charitable trusts for ministers of various church denominations, for foreign missions, for churches, priests, Catholics, Protestants, Jews, whites, negroes, for relief of the Indians, for widows or orphan children of Masons or other fraternities, for sectarian old folks homes, orphans, and so on". But in the illustrations given the government does not administer, the government does not audit, the government does not direct,

the government does not control—as it does in the Girard charitable trust. The Majority Opinion defends, defends and defends a cathedral in the wilderness near which, in the whole century-old litigation over the Girard estate, not a hostile arrow has fallen. Certainly there can be a charitable trust for Indians, but to say that such a trust administered by the government may legally and constitutionally deny Indians any of the provisions of the Bill of Rights or of the Fourteenth Amendment is to pose what everyone knows to be insupportable.

The Majority adds: "It is true that Girard appointed the City of Philadelphia as the trustee to administer the trust according to the terms of his will, but he certainly did not intend thereby to empower it to conduct such administration in its *public or governmental capacity*, or to bring into play any of its *proprietary* rights since it is merely the title holder of Girard's property and not its beneficial owner." (Italics in original). But how else can a City act except in its public or governmental capacity? A City is not like an individual citizen. It is the composite of all the citizens: it speaks and acts for everyone within its boundaries. The Majority says that the City is not the beneficial owner of the trust estate. It is indeed a beneficial owner. It is accepting the benefits of an obligation which otherwise it would have to discharge, namely, educating the children who are actually in Girard College.

The Majority asserts that the City is acting only as a fiduciary, but what is meant by acting as a fiduciary? The City does not have a fiduciary existence. It has only a municipal existence. The fact that it owns and operates a golf course does not make it a country club; the fact that it stages open air light opera does not make it an entertainment entrepreneur; the fact that it owns and operates swimming pools does not make it a recreation park promoter. There is not a private school in the whole State of Pennsylvania which is controlled and managed by a City or any municipality as is the Girard College.

The Majority declares itself unable to perceive any difference between the legal principles which apply to Girard College which "is a comparatively large institution," and those which govern "the smallest of private schools." The difference, however, is one which requires no microscope to detect. The Girard College has a board of directors made up of the Mayor of Philadelphia, the President of City Council, and twelve members appointed by the Courts of Common Pleas. This Board thus represents the body politic, the public, the citizenry, of the County of Philadelphia, a sovereign subdivision of the sovereign State. Since our judges are elected by the people, as are the Mayor and President of City Council, the Board of City Trusts is therefore an expression of the people themselves. The private school, on the other hand, is strictly a private commercial enterprise run for profit. The legal principles which control Girard College are separated by a chasm as wide the constitution itself from a private school owned by private individuals, and run by private individuals, all for the monetary advantage of private individuals. Private schools receive no tax exemption. For that reason alone the legal principles which guide their destiny are quite different from those which apply to Girard College which enjoys a tax exemption annually of $550,700. (*Ogontz School Tax Exemption Case*, 361 Pa. 234). No private school in the State can boast the governmental direction, control, and privileges which are as much a part of Girard College as the buildings themselves.

The Majority makes the statement that the Girard College "has been supported and maintained for now over a century by Girard's estate; not a penny of State or City money has ever gone into it." The obvious answer to that observation is that the State and the City have spent "not a penny" but countless tens of thousands of dollars in making Girard College the institution it is today. Who can calculate the cost to the State of the printing, clerk hire, and secretarial service which went into the actions of the Gen-

eral Assembly in holding hearings, conducting investigations, drafting bills and enacting them into law? Who knows how much it cost the City of Philadelphia for the hearings on and the printing of the 48 ordinances passed by the Council of Philadelphia in organizing and directing the establishment of Girard College? Who knows how much it cost for all the special visitations, for the audits, for the inspections and examinations conducted by the State of Pennsylvania and the City of Philadelphia in behalf of Girard College? Who knows what it cost the City to work out the investements which have increased the capital of Girard College from near-extinction to $98,000,000?

The Majority reminds us that: ". . . it must also be remembered that the city in its own right was a second beneficiary of part of Girard's residuary estate, so that it had an independent interest of its own to protect, wholly apart from its status as fiduciary." But the fact that the City had an independent interest of its own to protect proves all the more the *public* nature of the City's interest in the Girard estate; and that is the only question before us in this appeal, namely, is Girard College a public institution or a private charity?

The theory advanced by the appellees that if the decision of the lower Court is reversed, testators in the future will not be permitted to leave their property to whomsoever they wish is sheer chimera. The freedom of *jus disponendi* will never be curtailed in America; it is part of our American liberties. What the Commonwealth, the City, and the appellants contend, and properly so, is that if a testator, for benefits which accrue to his estate and to the accomplishment of his desires, wills his property to the government in trust, he may not ask the government to do anything which is contrary to the objectives of the government.

The whole history of Stephen Girard's life and the wording of his will demonstrate that he never intended, desired, or wished that the government should administer his trust in any way which would run counter to the intend-

ment of the Constitution. In fact among his last words appeared the following: "And, especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars."

The phrase "happy constitutions" undoubtedly refers to the Constitution of Pennsylvania and the Constitution of the United States. Adherences to those Constitutions requires the reversal of the decision of the Court below.

Appendix B

TEXT OF STATUTES INVOLVED

PENNSYLVANIA ACT OF JUNE 30, 1869, P. L. 1276

A FURTHER SUPPLEMENT

To an Act, entitled "An Act to incorporate the City of Philadelphia, approved the second of February, one thousand eight hundred and fifty-four, creating a board called directors of city trusts."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That from and after the first day of July next, all and singular the duties, rights and powers of the City of Philadelphia, concerning all property and estate whatsoever, dedicated to charitable uses or trusts, the charge or administration of which are now or shall hereafter become vested in or confided to the city of Philadelphia, shall be discharged by the said city through the instrumentality of a board composed of fifteen persons including the mayor of said city, the presidents of the select and common councils * for the time being, and twelve other citizens, appointed as hereinafter provided, to be called directors of city trusts, who shall exercise and discharge all the duties and powers of said city, however acquired, concerning any such property appropriated to charitable uses, as well as the control and management of the persons of any orphans or others, the objects of such charity, to the extent that the same have been or hereafter may be, by statute law or otherwise, vested in or delegated to the said city or the officers thereof.

SECTION 2. The judges of the supreme court, together with the judges of the district court and the court of common pleas of the city and county of Philadelphia, shall form a board of appointment,[1] of which the chief justice of the supreme court shall *ex officio* be president, which shall convene in the city of Philadelphia, at such time and place as the said chief justice shall appoint, within eight weeks from the passage of this act, and select and appoint, from the citizens of said city, twelve persons to serve, during good behavior, as members of the before-mentioned board of directors of city trusts, subject, however, to removal as hereinafter provided; vacancies in the number of said directors of trusts shall be filled from time to time by the said board of appointment; and any director of trusts may be removed from his office by the concurrent vote of two-thirds of the members of the board of appointment.

SECTION 3. Said directors of trusts shall meet every month, and as often as the business entrusted to them may require; a majority of the whole shall constitute a quorum for the transaction of business; at their first meeting after organization, and annually thereafter, they shall elect from their own number a president, who shall serve until the first day of the following year, and also a secretary, who shall be a salaried officer and not a member of the board, to serve for the same period; the treasurer of the City of Philadelphia shall be the treasurer of the said directors of trusts.

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[1] By Article V, Section VI, of the Constitution of Pennsylvania, the jurisdiction and powers theretofore possessed by the District Courts and Courts of Common Pleas were vested in the Courts of Common Pleas.

Article V, Section XXI, of the Constitution of Pennsylvania, directs that the judges of the Supreme Court shall not exercise any power of appointment.

See Act of Assembly, page 10.

* The Legislature, at its 1919 Session, amended the Charter of the City, providing for a single Councilmanic Chamber, reducing the Board to fourteen persons.

SECTION 4. The said directors of trusts shall have power to make rules and by-laws for the proper regulation of their business, to appoint as many agents as in their judgment shall be required for the proper discharge of all the duties delegated to said directors, and determine the duties and compensation of all such agents and appointees; also in the name of the said city, and in accordance with the conditions of said charitable trusts, to make all leases, contracts and agreements whatsoever, which, in the course of the administration and management of said property, it may from time to time become necessary and proper to make and execute; and it shall be the duty of the said directors of trusts, for and in the name of the said City to do, perform and discharge, all and singular, whatever acts and duties are or from time to time may become proper or necessary to be done by the said city in discharge of said trust, and to make an annual report thereof to the Councils of the City, to the board of appointment and to the Legislature of the state of Pennsylvania.

SECTION 5. It shall be the duty of the said directors of trusts, immediately after their organization, to provide a suitable place for the safe keeping of all the title papers, books of account, records and documents whatsoever of the said city, appertaining to the property, the care and management whereof, and the trusts and duties, the discharge whereof, for the said city, it is intended to devolve upon said directors of trust; and thereupon, on notice to the agents and employees of the city having such title papers, account books, records and documents in their charge, the same shall be delivered into the custody of the said board of trusts.

SECTION 6. The said directors, in the discharge of their duties, and within the scope of their powers aforesaid, shall be considered agents or officers of said city; but no compensation or emolument whatever shall be received for such services, nor shall any of them have or acquire any personal interest in any lease or contract what-

ever, made by said city, through said directors, or through any agent or employee, whatever, appointed by them.

SECTION 7. That so much of any act of assembly as is hereby altered or supplied be and the same is hereby repealed.

PENNSYLVANIA ACT OF MARCH 24, 1832, P. L. 176 (1831-1832 volume)

AN ACT

To enable the Mayor, Aldermen, and Citizens of Philadelphia to carry into effect certain improvements; and execute certain trusts.

* * * * * * *

SECTION 10. *Be it further enacted by the authority aforesaid*, That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and do and execute all such acts and things whatsoever as may be necessary and convenient for the full and entire acceptance, execution and prosecution of any and all the devises and bequests, trusts and provisions contained in the said will, which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the City of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws.

SECTION 11. *And be it further enacted by the authority aforesaid*, That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the Trustees or Directors of said college, and approved of by a majority of the Select and Common Councils of the City of Philadelphia.

PENNSYLVANIA ACT OF APRIL 4, 1832, P. L. 275 (1831-1832 volume)

A SUPPLEMENT

To the Act entitled "An act to enable the mayor, aldermen and citizens of Philadelphia to carry into effect certain improvements and to execute certain trusts."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same:* That the Select and Common Council of the city of Philadelphia, shall be and they are hereby authorized to provide by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard.

PENNSYLVANIA ACT OF FEBRUARY 27, 1847, P. L. 178

AN ACT

Relative to the Girard College for Orphans.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That the guardians for the relief and employment of the poor of the city of Philadelphia, the district of Southwark, and the townships of the Northern Liberties and Penn, be and they are hereby authorized, with the consent of the surviving mother, guardian, next friend, or by their own authority, if there be no such mother, guardian, or next friend of any poor white male orphan child within this Commonwealth, between the age of six and ten years, for whose admission to the Girard College for Orphans application shall have been made, to bind such orphan child by indenture, to the mayor, alder-

men and citizens of Philadelphia, as trustees under the will of Stephen Girard, deceased, as an orphan to be admitted into the said college, to be there maintained and educated according to the provisions, and in the manner and under all the regulations and restraints directed or contained in the said will, or as the said corporation of the mayor, aldermen and citizens of Philadelphia shall lawfully ordain, under the said will; which said indenture shall not express any term or time when the said binding shall expire; but such binding shall, nevertheless, expire at furthest, before the said Orphans shall attain the age of eighteen years, or at the pleasure of the said trustees at any time after he shall have arrived at between the ages of fourteen and eighteen years, or at any time before his attaining the said age of fourteen years, when the said orphan shall, by mal-conduct, cease to merit the benefits of the said college; and the said trustees shall duly declare the said fact, and such orphan child shall be bound to abide by and submit to such provisions, regulations, and restraints, as fully as if he were of full age, and consented thereto at the time of such binding, and shall be entitled to the benefits of the said college, according to the will of the said testator; and the said parties shall be mutually entitled to relief for breach of duty by the other, in the same manner and by the same tribunals as is now provided by law, in regard to apprentices and their master or mistress, respectively.

SECTION 2. That it shall be lawful for the said mayor, aldermen and citizens of Philadelphia, and for such persons as they shall, by ordinance, authorize, appoint, and direct for this purpose, to bind, by indenture, any and every such orphan child who shall have remained in the said college until he shall arrive at between fourteen and eighteen years of age, and before his arrival at the age of eighteen years, to serve as an apprentice to any suitable person in this Commonwealth, in either of the occupations of agriculture, navigation, arts, mechanical trades or manufactures, according to the will of the said testator; and such orphan

child shall be bound to serve the time in his respective indenture contained, so as such time or term of years of such apprentice do expire at or before the age of twenty-one years, as fully, to all intents and purposes, as if he were of full age at the time of making such indenture; and the said indenture shall contain, and be deemed valid in containing such covenants and stipulations for the feeding, clothing and educating such orphan child as the said corporation, by ordinance, from time to time, shall direct. And in case the master of any such apprentice shall die before the expiration of such apprenticeship, it shall be lawful for the said corporation, or such persons as they shall authorize, appoint and direct, as aforesaid, again to bind such orphan child to such other person in this Commonwealth, as they shall approve, being of one of the occupations aforesaid, and so on from time to time, as often as such master shall die before such apprentice shall attain the age of twenty-one years, all which indentures shall be of the same effect and validity, and shall in all respects be as subject to the acts of assembly which now are or at the time shall be in force in this State, in regard to apprentices and their masters and mistresses, as if the said indenture had been made in conformity to the said acts.

SECTION 3. The said corporation of the mayor, aldermen and citizens of Philadelphia, shall be the guardian of every such orphan child during the time that he shall remain in the said orphan college; and in case any such orphan child, at or before the time of such binding to the said corporation as an orphan, or during his remaining in such college, shall possess or become entitled to any effects or property, the said corporation shall be entitled, in like manner as other guardians, to demand and receive the same from any person having possession thereof, or owing the same, and to give acquittance therefor; and it shall be the duty of the said corporation, to take care of the same as guardian, and to make the same productive as far as reasonably can be, and to deliver and pay over the same

with the increase, to the said orphan on his attaining the age of twenty-one years, or to his legal representatives if he shall die before attaining that age.

SECTION 4. That it shall be lawful for the said the mayor, aldermen and citizens of Philadelphia, to make application, at any time after such binding, to the judges of any court in the city and county of Philadelphia, having equity jurisdiction to cancel and annul the said indenture, or other instrument of binding, so that the same shall be no longer binding upon the said corporation, as trustees of the said orphan college; and upon such application being made, and notice thereof being given to the overseers or guardians of the poor of the district in this Commonwealth in which such orphan had a settlement, at the time of his admission, or to the "guardians for the relief and employment of the poor of the city of Philadelphia, the district of Southwark, and the townships of Northern Liberties and Penn," if such orphan had no settlement in this State, at the time of his admission, and sufficient cause being shown to the satisfaction of the said court, it shall be lawful for the said court to decree and order that the said indenture shall be cancelled and annulled, either absolutely or upon such terms as the court shall see fit; and the same shall thereupon be cancelled and annulled accordingly, and the said orphan child, and the corporation aforesaid, and all other persons be respectively discharged therefrom.

PENNSYLVANIA ACT OF APRIL 20, 1853, P. L. 624

AN ACT

* * * *relative to the Girard College for Orphans.*

SECTION 6. That the mayor, aldermen and citizens of Philadelphia, or such persons as they shall by ordinance direct and appoint, shall bind by indenture as apprentices, the orphan children in the Girard College for Orphans, in

the manner, and upon the terms and conditions mentioned and contained in the act entitled "An Act relative to the Girard College for Orphans," approved the twenty-seventh day of February, one thousand eight hundred and forty-seven, to suitable persons within this Commonwealth, in suitable occupations, such as agriculture, navigation, arts, mechanical trades, and manufactures, as mentioned in the will of the late Stephen Girard.

PENNSYLVANIA ACT OF MAY 23, 1887, P. L. 168

AN ACT

To authorize the binding of any orphan, to any city, to be made by mother, guardian or next friend.

SECTION 1. *Be it enacted, &c.*, That in all cases where by any law of this Commonwealth, the guardians for the relief and employment of the poor of any city, district or township, are authorized to bind any orphan to any city, the said binding may be made by the mother, guardian or next friend of the said orphan, and shall be of the same force and effect, and as binding upon the said orphans, as if the indenture were executed by the guardians of the poor.

Appendix C

CITATIONS OF THE PRINCIPAL ORDINANCES OF THE CITY OF PHILADELPHIA RELATING TO THE GIRARD ESTATE AND GIRARD COLLEGE*

January 31, 1833 (p. 157) (management of the Girard Estate generally).

March 21, 1833 (p. 159) (provided for the erection of the College and named it "The Girard College for Orphans").

March 28, 1833 (p. 160) (supplemented Ordinance of March 21, 1833).

November 21, 1838 (p. 159) (management of the Girard Estate generally).

July 14, 1836 (p. 161) (provided for the purchase of books and equipment for the College).

July 26, 1837 (p. 161) (management of the College generally).

December 3, 1840 (p. 167) (management of the Girard Estate generally).

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* The page citations in the case of ordinances adopted between the years 1833 and 1841, inclusive, refer to "Digest of Ordinances of City of Philadelphia and Acts of Assembly relating thereto", Crissy, 1841. In the case of ordinances adopted between the years 1847 and 1854, inclusive, the page citations are to "Digest of Acts of Assembly Relating to the City of Philadelphia and the (Late) Incorporated Districts of the County of Philadelphia and of the Ordinances of the said City and Districts", Duane, Hood and Myers, 1856. For the year 1855 and subsequent years, the citations are to the annual volume of ordinances.

January 28, 1841 (p. 162) (required all contracts entered into by the trustees to be approved by the City Councils).

March 11, 1841 (p. 167) (salaries fixed for officers of the Girard Estate and College).

June 3, 1841 (p. 168) (supplemented Ordinance of March 11, 1841).

February 27, 1847 (p. 242) (admission requirements for the College).

May 27, 1847 (p. 245) (provided for a Board of Directors to manage the College).

September 16, 1847, (p. 246) (provided for staff and faculty positions and fixed salaries).

November 9, 1848 (p. 249) (visitation committee of the City Councils established).

December 21, 1848 (p. 249) (supplemented Ordinance of May 27, 1847).

September 13, 1849 (p. 250) (care of property belonging to students at College).

January 10, 1850 (p. 251) (organization of faculty and courses of instruction).

January 16, 1851 (p. 252) (supplemented Ordinance of January 10, 1850).

December 2, 1852 (p. 252) (binding out of orphans).

April 20, 1853 (p. 250) (provided generally for the College).

July 7, 1853 (p. 254) (binding out of orphans).

April 27, 1854 (p. 254) (duties of the secretary of the College).

November 30, 1855 (p. 257) (appropriation for construction of buildings within the College).

June 25, 1856 (p. 172) (changes made in the supervision and management of the College).

March 9, 1860 (p. 110) (employment of counsel).

July 18, 1860 (p. 315) (management of Girard Estate generally).

December 22, 1860 (p. 447) (management of Girard Estate generally).

December 13, 1864 (p. 483) (authority to compromise suit with Girard's heirs).

June 29, 1868 (p. 277) (appointment of solicitor for the trustee of Girard's Estate).

IN THE

Supreme Court of the United States

October Term, 1956 — No. 769

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST and ROBERT FELDER, *Appellants*

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA, *Appellee*

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS THE APPEAL

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v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA, *Appellee.*

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS THE APPEAL

ARGUMENT

Appellants reply as follows to appellee's "Motion to Dismiss The Appeal And Brief In Opposition To Petition for Writ of Certiorari":

1. The constitutionality of the Act of June 30, 1869, P. L. 1276, was properly drawn into question in the state courts. Appellee's contrary contention (M.D. pp. 15-21)[1]

[1] "M.D." refers to appellee's motion to dismiss the appeal and brief in opposition to petition for writ of certiorari.

is patently incorrect. As stated in the jurisdictional statement, this question was squarely raised both before the Orphans' Court of Philadelphia County (J.S.[2] pp. 11-12) and on appeal in the Supreme Court of Pennsylvania (J.S. pp. 12-13) in the statement of questions involved. It should be noted that rule 35 of the Rules of the Supreme Court of Pennsylvania specifically provide that the issues considered by the Court are only those set forth in the statement of questions involved.

Further, on petition for reargument in the Supreme Court of Pennsylvania, the constitutionality of the Act of June 30, 1869, was once again raised.[3]

Appellants submit that it is impossible to raise the question in any clearer manner.

2. Appellee's contention that the decision of the Supreme Court of Pennsylvania rests upon a non-federal basis will not withstand analysis. It is true that there is language in the opinion of the court below indicating that even if appellee's refusal to admit appellants Foust and Felder to Girard College denied them their constitutional rights, the court would not order them admitted, but would merely appoint a private trustee (J.S. App. pp. 39-40). It is all

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[2] "J.S." refers to appellants' jurisdictional statement.

[3] The first point presented by appellants in their joint petition for reargument was as follows:

> "The opinion of the Court misconceived the question raised by all appellants and in particular, by the Commonwealth in its Statement of Questions Involved, to wit:
>
> > 'Does the Act of June 30, 1869, P. L. 1276, creating the Board of Directors of City Trusts violate the Fourteenth Amendment if it is construed to permit the Board to discriminate on the basis of race or color in the admission of students to Girard College?'"

too clear that this expression on the part of the court below was dictum in no way pertinent to that court's holding, for the significant fact remains that the court below did not remove the City of Philadelphia as trustee. Indeed, the court gave judicial approval to the continued operation of Girard College by City Officials in a manner which excluded appellants Foust and Felder and other qualified Negro boys.

We reassert the argument advanced in our jurisdictional statement (pp. 21-22) and add only that appellee's argument is the same as that advanced in *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, and *Sipuel v. Board of Regents*, 332 U. S. 631. In each case, the state argued that the Negro appellant would not obtain the relief sought—admission to law school—if the state abolished all state law schools as it had the constitutional right to do. This Court held that so long as the state offered educational opportunities to white students, it had to offer the same opportunities to Negroes at the same time and under the same conditions.

Within the last several months, the same question was before the United States Court of Appeals for the Fifth Circuit in a case involving a municipal beach and swimming pool. *City of St. Petersburg v. Alsup*, 238 F. 2d 830 (5th, 1956), petition for cert. filed February 8, 1957, October Term, 1956, No. 757. In response to the contention that a court order enjoining segregation would force the municipality to close the pool, the Court of Appeals stated: (p. 832)

> "It is no answer to say that the beach and pool cannot be operated at a profit on a nonsegregated basis, and that the City will be forced to close the pool.

Of course, financial loss cannot justify illegal operation; and, unfortunate as closing the pool may be, that furnishes no grounds for abridging the rights of the appellees to its use without discrimination on the ground of race *so long as it is operated.*" (Emphasis added.)

In this appeal, appellants Foust and Felder similarly request admission to Girard College so long as the City of Philadelphia continues to administer it. And we submit that a state court cannot foreclose review of the substantial constitutional issues presented by stating that it might substitute a private trustee for the City, even while it does not do so.

We acknowledge that the constitutional issue would be significantly different if the City no longer administered the College. Still involved, nevertheless, in this appeal, would be the constitutional issue raised by Points 2 and 3 of the jurisdictional statement, to wit: whether the other state activity is such that the Fourteenth Amendment is applicable to Girard College even if the City of Philadelphia no longer administered the College. Moreover, if the court below ordered the removal of the trustee, there would be a new constitutional issue raised, to wit: whether the action of the Pennsylvania courts in substituting trustees for the sole purpose of precluding the admission of Negroes in and of itself violated the Fourteenth Amendment.

3. The suggestion of mootness of the appeal of appellant Foust, even if correct, (M.D. p. 6 fn. 4) in no way affects the jurisdiction of this Court. Appellant Felder is not yet ten years old. Furthermore, the Commonwealth of Pennsylvania as *parens patriae* (R. 121a) raises the ques-

tion of the illegal and unconstitutional administration of the trust for the benefit of all its citizens[4] and its standing has never been questioned. The standing of the Commonwealth is in no way dependent upon the eligibility of any individual. Indeed, under the law of Pennsylvania, it is the duty of the Attorney General on behalf of the public to enforce charitable trusts. *Wiegand v. The Barnes Foundation*, 374 Pa. 149, 97 A. 2d 81 (1953); *Abel v. Girard Trust Company*, 365 Pa. 34, 73 A. 2d 682 (1950).

Moreover, we firmly reject the assertion that the appeal is moot as to Foust. In fact, this in itself raises an additional substantial federal question. The Will permits admission to the College for those between the ages of 6 and 10, but once admitted they are entitled to stay there until they are 21 years old. Foust applied for admission when he was 7, but the time-consuming process of litigation has brought him beyond his tenth birthday. This ought not to deprive him of the enjoyment of the educational opportunities at the College until he is 21 years old—a privilege to which he would have been entitled had he not been deprived of his constitutional right.

It is too clear for argument that this case is completely different from the one in which a person applies for admission to high school and completes high school before his constitutional rights have been adjudicated. In such a case, the decree of this Court cannot give him any part of his high school education on a non-segregated basis. Here, however, this Court's decree can give Foust approximately 11 years of the benefits of Girard College.

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[4] See *Georgia v. Pennsylvania R. Company*, 324 U. S. 439, 447, where this Court, in allowing an action by the State of Georgia as parens patriae under the anti-trust laws, stated that "[s]uits by a State parens patriae have long been recognized."

In disposing of cases before it, this Court will always make such disposition as justice may require. *Ashcraft v. Tennessee*, 322 U. S. 143, 156; *Patterson v. Alabama*, 294 U. S. 600, 607. In considering the appeal of appellant Foust, justice and equity require application of the time-honored principle that equity regards as done what ought to have been done. Accordingly, for this purpose, appellant Foust should be deemed to have been admitted to Girard College as of the date of the denial of his application.

4. Appellee's attempt to minimize the crucial importance of the succession of implementing statutes and ordinances is misleading. (For a statement of these enactments, see J. S. pp. 6-10, App. pp. 112-123). Indeed, this Court in *Vidal v. Girard's Executors*, 2 How. 127, 110-191, recognized in clearest language the significance of the implementing Acts of March 24, 1832, P. L. 176 and April 4, 1832, P. L. 275. This Court held that the Act of March 24, 1832, in particular constituted "a full recognition of the validity of the devise for the erection of the college" and that both of the above statutes conferred "positive authority . . . upon the City authorities to act upon the trusts under the Will and to administer the same. . . ." Finally, the opinion of Mr. Justice Story refers to these statutes as of the "highest importance and potency."[5]

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[5] The pertinent portion of this Court's opinion in the *Vidal* case is as follows:

"But what is more direct to the present purpose, because it imports a full recognition of the validity of the devise for the erection of college, is the provision of the 11th section of the [Act of March 24, 1832, P. L. 176] which declares 'That no road or street shall be laid out, or passed through the land in the County of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the trustees or directors

Whether the gift for the College and the competency of the City to act as trustee may have been upheld even in the absence of the above implementing legislation is an academic question of no real pertinence here. The critical fact is that there was genuine doubt on these questions and the Legislature accordingly acted twice to confer authority upon the City.

The Act of February 27, 1847, P. L. 178, and the supplementing Act of April 20, 1853, P. L. 624, further dramatically illustrate how the sovereign power of the state was invoked to bring to fruition the private testamentary scheme. These acts are special statutes enacted to implement the Will. Indeed, the Act of February 27, 1847, is entitled "An Act Relative to the Girard College for Orphans" (J.S. App. p. 116). By this statute, the law relating to the indenturing of orphan children was altered. The Act changed the ages for indenturing to comply with those fixed in Girard's Will. It provides for the expiration of

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of the said College, and approved by a majority of the select and common councils of the city of Philadelphia.' The [Act of April 4, 1832, P. L. 275] is also full and direct to the same purpose, and provides, 'That the select and common councils of the city of Philadelphia, shall be, and they are hereby authorized to provide, by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard.' *Here, then, there is a positive authority conferred upon the city authorities to act upon the trusts under the will, and to administer the same through the instrumentality of agents appointed by them.* No doubt can then be entertained, that the Legislature meant to affirm the entire validity of those trusts, and the entire competency of the corporation to take and hold the property devised upon the trusts named in the will . . . the *recognition and confirmation of the devises and trusts of the will by the Legislature, are of the highest importance and potency.*" (Emphasis supplied)

the indenture if before attaining the age of fourteen, the child is expelled from the College because of misconduct. In fact, there are several provisions requiring action to be taken "according to the Will of [Stephen Girard]," thus incorporating by reference provisions of the Will into the statute. Thus, the most intimate rights of guardianship and indenture of minors are prescribed by state statute only for the students at Girard College and in terms complying with the requirements of the Will.

Appellees assert that "Girard did not stipulate that any such legislation be enacted" (M.D. p. 11). While he did not stipulate that such legislation be enacted in express terms, he provided this in effect in Article XXI, paragraph 5, of his Will which prohibits the admission of any orphan until such a law came into existence (R. 36a-37a).

Appellee's argument basically is that its action is not really action of government because it "has no choice but to follow the directions in the will" (M.D. pp. 21-22). Hence it compares the innumerable ordinances adopted by the Philadelphia City Councils as merely internal regulations comparable to the corporate acts of a private corporate trustee (M.D. pp. 10-12, 21-24). It is noticeable, however, that those who make this argument shrink from saying the same thing regarding state statutes. When they come to deal with the state statutes implementing Girard's Will they do not assert that these too are merely internal acts in aid of the municipal trustee's performance of its duties.

But the real vice of the argument is the same, whether it be an ordinance of a city or a statute of a state that is involved. The private trust company's resolutions affect only the corporation, for it is not a governing body. Unlike

a private corporate trustee, the acts of governmental bodies affect all its citizens. Accordingly, when the City of Philadelphia acts by ordinance or the Commonwealth of Pennsylvania acts by statute, each is exercising the highest power of a sovereign.

The implementing statutes of the Pennsylvania Legislature conferring authority upon the City to administer the trusts and changing the law with regard to the indenturing of orphans, as well as the numerous ordinances of the Philadelphia City Councils, are acts of the sovereign. They are not acts of a private trustee. They are not corporate resolutions authorizing officers of a private trustee to act. And the evil of appellee's argument is that it would stamp such legislative action as purely private and would ascribe vitality to it as coming not from the power of the state but from the will of a private testator.

Accordingly, appellee's argument confirms our view that there can be no justification for carving out the government's fiduciary activity from the scope of the Fourteenth Amendment. What it does as fiduciary is inextricably entwined with its capacity as a law-making power. This very fact forbids its being treated as a private fiduciary which has no law-making power and which cannot make laws in aid of its testator's wishes.

It is here, too, that the inadequacy of appellee's major position becomes clear. It argues that no state statute is involved because the statute merely authorizes the city to act as directed by the testator. But, if the legislature could not authorize its officials to act in violation of the Fourteenth Amendment, how can it establish their offices and then assert that they may act in violation of the Fourteenth Amendment whenever private testators so wish? How can

a state officer justify his act because a private testator ordered it, if the same act ordered by his master, the state, would not be excused?

It is significant that appellee cannot find cases running its way. Instead, it relies upon cases which do not involve state officials, but private persons whose acts are such that the prohibitions of the Fourteenth Amendment are sought to be applied to them. Typical of this is its citation of *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541 (1949), cert. den. 339 U. S. 981, where a private corporation was allowed to discriminate against Negroes in its choice of tenants despite the fact that various forms of state aid had implemented the establishment of the housing project. The *Stuyvesant Town case* is clearly distinguishable in that the discriminatory acts there were performed by employees and officers of a private corporation.

An argument very similar to that of appellee was recently made in the Court of Appeals for the Fifth Circuit. In *City of St. Petersburg v. Alsup*, supra, the city asserted the position that since under state law it operated its municipal beach and swimming pool in a proprietary capacity, the limitations of the Fourteenth Amendment were not applicable. The city argued it was its right and duty to operate these facilities as would a private utility for the best financial result, which could only be achieved if Negroes were excluded. The court rejected this argument and pointed out, relying on this Court's opinion in *City of Trenton v. State of New Jersey*, 262 U. S. 182, 191-192, that the category of "proprietary" activity of government had been created by the judiciary to mitigate the harshness of the sovereign immunity from tort liability. Such

a doctrine, created for such a purpose, could not be distorted to do injustice by creating immunity from the Fourteenth Amendment. The Court of Appeals stated: (p. 832)

> "A state cannot, by judicial decision or otherwise, remove any of its activities from the inhibitions of the Fourteenth Amendment. See *Nixon v. Condon*, 286 U. S. 73, 88, 52 S. Ct. 484, 76 L. Ed. 984. It is doubtful whether a municipality [3] may ever engage in purely private action that would not be action of the state. See *In re Civil Rights Cases*, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835; *Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16, 6 L. Ed. 149."

Footnote 3 of the opinion states:

"Except possibly in some fiduciary capacity. See Estate of Girard, Pa., 127 A. 2d 387."

It is submitted that there is no greater justification for exempting fiduciary functions from the Fourteenth Amendment than there is for exempting proprietary functions. Accordingly, the decision below, if allowed to stand, can lead logically to a still further narrowing of the Fourteenth Amendment. The federal questions presented here will thus have a vital impact on the future judicial interpretation of the Fourteenth Amendment by state courts and the lower federal courts.

Finally, appellee has pushed too hard its assertion that there is no state action because only private money has been used. In the first place, this assertion is not completely accurate. Unlike a private trustee, the City has received no trustee's commissions on income and capital gains. Since 1869 the trust estate has received the gratui-

tous services of fourteen public officials constituting the Board of Directors of City Trusts, including the Mayor and the President of City Council, as well as the gratuitous services of the City Treasurer and the City Controller. And in the period prior to 1869, the estate had the benefit of the members of the City Councils as well as numerous other city officers.

Moreover, and even more important, money is not the exclusive test. Appellee loses sight of the fact that unlike the *Stuyvesant Town* case it is not a private person who speaks to the applicants, but an official of their government. The fact that a private testator provided the original capital fund is irrelevant to the question whether citizens may be discriminated against by the officers of their own government and be told that they have no right to complain because the discrimination is practiced at the behest of a private citizen whose wishes are to be made supreme over the government. This, we submit, is to lose sight of the human values which lie behind the great liberating command of the Fourteenth Amendment.

WHEREFORE, appellants urge this Court to deny the motion to dismiss the appeal.

Respectfully submitted,

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No. 765 October Term, 1956.

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST AND ROBERT FELDER,

Appellants,

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA,

Appellee.

On Appeal From the Supreme Court of Pennsylvania.

MOTION TO DISMISS THE APPEAL and BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

October Term, 1956.

No. 769.

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST AND ROBERT FELDER,

Appellants,

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA,

Appellee.

MOTION TO DISMISS THE APPEAL AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the final judgment and decree of the Supreme Court of Pennsylvania be dismissed on the ground that the judgment below cannot be appealed directly to the Supreme Court of the United States under 28 U. S. C. A. § 1257(2), and on the further ground that no substantial federal question is presented. Since this Court is required by 28 U. S. C. A. § 2103 to treat the appeal as a petition for certiorari, appellee requests the Court to deny the peti-

tion on the ground that there is no basis for jurisdiction, and that the case does not present a substantial federal question.

Opinions Below.

The opinion of the Supreme Court of Pennsylvania (J. S. 25) [1] is reported as *Girard Will Case*, 386 Pa. 548, 127 A. 2d 287 (1956). The opinions of the Orphans' Court of Philadelphia County (R. 119a, 170a) [2] are reported as *Girard Estate*, 4 Pa. D. & C. 2d 671 (1955), and 4 Pa. D. & C. 2d 708 (1956).

Jurisdiction.

The Supreme Court of Pennsylvania held that to deny admission of appellants Foust and Felder to Girard College did not violate the Fourteenth Amendment since they are not "poor white male orphans, between the ages of six and ten years" as required by Stephen Girard's will.

That court did not decide, as appellants say it did (J. S. 2), or even state that the Board of Directors of City Trusts was "acting pursuant to the Act of June 30, 1869". There has been no decision on the validity or invalidity of that statute or any other statute. Accordingly this Court does not have jurisdiction of this case by appeal.

Nor does this Court have jurisdiction by way of certiorari since the state courts have held that under Pennsylvania law the relief requested by appellants cannot be granted, irrespective of the ultimate decision on the federal constitutional question.

Statute Involved.

This proceeding does not involve any statute whatever. The statute which appellants contend was drawn in

(1) "J. S." refers to appellants' Jurisdictional Statement.
(2) "R" refers to the printed record filed with the Supreme Court of Pennsylvania and certified to this Court.

question as repugnant to the Fourteenth Amendment and allegedly upheld by the Supreme Court of Pennsylvania is the Act of June 30, 1869, P. L. 1276, 53 Purdon's Stat. § 6481 *et seq.*, printed in Appendix B of appellants' Jurisdictional Statement (J. S. 112).

Questions Presented.

1. Where the state courts have held that irrespective of the determination of a federal constitutional question, state law requires that the ultimate decision be against appellants, should this Court assume jurisdiction, either by appeal or certiorari?

2. Was the validity of a state statute, creating a Board to discharge "all and singular the duties, rights and powers of the City of Philadelphia, concerning all property and estate whatsoever, dedicated to charitable uses or trusts, the charge or administration of which are now or shall hereafter become vested in or confided to the City of Philadelphia," drawn in question as being repugnant to the Fourteenth Amendment, and was there a decision in favor of its validity by the state courts where, prior to a petition for reargument in the state court of last resort, no argument, either oral or written, concerning the statute was addressed by any party to any of the state courts, and where no question concerning the validity or invalidity of the statute was mentioned in any of the five opinions filed by the various state court judges?

3. Where the terms of a testamentary trust provide for the erection, operation and continued support of an orphan establishment for "poor white male orphans, between the ages of six and ten years", and no funds other than those of the testator have ever been used therefor, does administration of such trust in accordance with the directions of the testator by a municipality, the trustee designated by the will, acting only in its fiduciary capacity, violate the equal protection clause of the Fourteenth Amendment?

Statement of the Case.

Stephen Girard, by his will, probated December 31, 1831, made numerous gifts to various named individuals and organizations, to the cities of Philadelphia and New Orleans, and to the Commonwealth of Pennsylvania. He then gave most of his residuary estate in trust to erect a "college". His will sets forth at great length the details of the erection of the buildings, the selection of instructors, the curriculum and many other things. The college was to admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain" (App. 18a),[3] with preference given to orphans born in Philadelphia, Pennsylvania, New York City and New Orleans. He named as trustee "the Mayor, Aldermen and Citizens of Philadelphia", the then corporate title of the city (App. 11a).

Appellants Foust and Felder applied for admission to Girard College on February 1, 1954, and were advised by the trustee that they could not be admitted because neither was a "poor white male orphan between the ages of six and ten years, as required by the Will of Stephen Girard, deceased" (R. 70a, 79a). On September 24, 1954, these appellants petitioned the Orphans' Court of Philadelphia County for an order directing their admission to the college. Petitions were also filed on behalf of the Mayor of the City of Philadelphia, the City of Philadelphia, the Philadelphia Commission on Human Relations and, later, the Commonwealth of Pennsylvania, joining in the prayer for such relief. On July 29, 1955, the hearing judge denied the petitions on the ground that Stephen Girard's will was clear and valid and that the operation of Girard College was lawful. Exceptions were dismissed by the Orphans' Court en banc. Appellants appealed to

(3) Stephen Girard's will is printed in full in appellee's appendix to this motion and brief, reference to which is herein made by "App.".

the Supreme Court of Pennsylvania, which affirmed the decrees. In a carefully considered opinion, accompanied by a concurring opinion by Justice Bell, the court held that Stephen Girard's purpose was to establish an institution for poor white male orphans; that his will, many times upheld in the past against other attacks, is entirely valid; that the will is not discriminatory within the meaning of any constitutional doctrine; that Girard College is an orphan establishment operated entirely by private funds under the directions of a private will; that the administration of the trust is not contrary to any public policy or the Fourteenth Amendment; and that irrespective of any decision on the constitutional question appellants would not be entitled under state law to the relief sought.

Thereafter, appellants filed a petition for reargument in which, for the first time, they took the position that the issue in the case was not the validity of Girard's will or the administration of the Girard Estate by the city as trustee, but the constitutionality of the Act of June 30, 1869, P. L. 1276, which created the Board of Directors of City Trusts (hereinafter called the "Board") for the discharge of the fiduciary functions of the City of Philadelphia. This petition was dismissed without opinion.

SUMMARY OF ARGUMENT.

The appellants' Jurisdictional Statement does not properly state the true issues in this case. They have given a wholly false picture of both the nature of Girard's gift which created the college, and of the past and present contacts and relationship of the city and the state with the college, and of the opinions below.

In the courts below many questions directed to the Pennsylvania law of wills, trusts and public policy were raised and argued by appellants. There was but a single constitutional question—whether the Fourteenth Amendment forbids the City of Philadelphia to act as trustee for Stephen Girard. Whereas the courts below dealt with this question, among many others, and indicated that mere administration of this bona fide charitable trust by the city is not the type of "state action" which is prohibited by the Fourteenth Amendment, nevertheless each of those courts recognized that resolution of the constitutional issue does not decide the case. The prayer of the petition is that Foust [4] and Felder be admitted to Stephen Girard's college. The constitutional question concerns itself with the competency of the city to serve as trustee. Thus, even if the courts below erred in their decision on the constitutional question—which they clearly did not—still that would not mean that Foust and Felder would be admitted to the college. The courts below held that under the law of Pennsylvania the trust for "poor white male orphans" would continue as such, irrespective of the competency of the trustee.

None of the parties to this suit has requested that the trustee of the Girard Estate be changed. We submit that appellants, clearly recognizing that this court would not grant certiorari to review an academic question of consti-

(4) As to Foust this appeal is moot. He is now over ten years of age (R. 61a, para. 2).

tutional law, however interesting it might be, have attempted to bring that question before the court by way of an improper appeal. This appeal is predicated upon a question of the validity of a state statute which was at no point drawn in question in the state courts, and on which there has been no decision whatever by any of those courts.

In addition to the non-federal basis for the decision below, and to the fact that the decision below does not support a direct appeal, this case does not involve a substantial federal question that would entitle appellants either to an appeal or to a grant of certiorari. It is not a case of either discrimination or "state action", but involves only the right of an individual to leave his estate to the persons of his choice.

In any event, the decision of the judges of the Philadelphia Orphans' Court and Pennsylvania Supreme Court is so clearly in accord with the principles distinguishing individual from state action, as announced by this Court in the Fourteenth Amendment cases, that review by this Court is not warranted.

ARGUMENT.

Stripped of misleading statements and arguments,[5] this is not a case of racial discrimination but one involving the basic concepts of the law of charitable trusts.[6] As Mr. Chief Justice Stern, speaking for the majority of the court below, said (J. S. 25):

> "While it may seem unfortunate that the court is obliged to sanction the exclusion of any child from even a *private* school or orphanage because of race, creed or color if otherwise entitled to admission, the Court is clearly of opinion that the unanimous decision of the Orphans' Court, supported by the learned and comprehensive opinions of Judge Bolger and Judge Lefever, must be affirmed, it being clearly understood at the outset that the beneficiaries of the charity of Stephen Girard are not being determined by the State of Pennsylvania, nor by the City of Philadelphia, nor by this Court, but solely by Girard himself in the exercise of his undoubted right to dispose of his property by will, and, in so doing, to say, within the bounds of the law, who shall enjoy its benefits."

1. The Background.

The only difference between Girard College and any other charitable trust is that the administration of the private funds endowing the school has been entrusted to a public corporation rather than a private body. However, in an effort to maximize the contacts of the city and state with Girard College, appellants have given a wholly false picture of the nature of Girard's gift, and have re-

(5) See the discussion of such statements and arguments in the concurring opinion of Mr. Justice Bell (J. S. 43).

(6) Of the thirteen judges who heard the case only Justice Musmanno dissented. A reading of his opinion will show that he misunderstood the background of the case, much as appellants have in their Jurisdictional Statement.

ferred to a great number of instances of activity by state or city officials and public bodies which, under analysis, either had nothing to do with Girard College or were simply administrative rules for the trusteeship.

The Supreme Court of Pennsylvania expressly held that Girard's gift was for the benefit of his named beneficiaries (poor white male orphans) and not a gift to or for the benefit of the city (J. S. 29, 40-41). The question of Girard's intention was elaborately argued below. The court held that Girard intended the city to be merely the title holder of his estate, that he directed the city to use his estate only for the purposes specified in the will, and that he did not intend to empower the city to conduct the college in its public or governmental capacity (J. S. 35). In spite of these conclusions on questions of state law, appellants state as a fact that Girard left his estate "to the City of Philadelphia for various municipal purposes, the most important of these being the establishment of Girard College" (J. S. 5). In view of the decision below that the college was, like any other charitable gift of such a nature, intended for the benefit of the named beneficiaries, appellants' statement obliterates the principal distinction upon which the judgments below rest.

To the same effect, and presumably for the same purpose, is the reiteration of the argument made below that the operation of Girard College has to be a "public function", regardless of Girard's intent, because the city can only be a trustee for "public purposes", citing *Philadelphia v. Fox,* 64 Pa. 169 (1870). That decision also stated that "all charities are in some sense public" (*Id.* at p. 182), and it is clear that the decisions referring to the operation of Girard College as "public" mean no more than that the college is a valid charity. Any other charity, whether the trustee is a public body or not, has to be "public" in the same manner in order to be a valid charity. Any other charity in Pennsylvania would also be entitled to the tax exemption noted by appellants; Girard College's

exemption arises from the fact that it is a purely public charity, not from any city or state contacts.

Appellants refer to a number of state statutes and city ordinances. These they describe as "the foundation and support of what Girard wanted" (J. S. 7). A study of these statutes and ordinances and of the background of the trusteeship as interpreted in court decisions for over a century, shows this statement as applied to Girard College to be flagrantly misleading.

The city's trusteeship of Girard College did not arise from any statute or ordinance passed following Girard's death, and the city's competency to act as trustee did not depend on any such legislative action. From 1701 to 1776 Philadelphia acted under the charter granted by William Penn. Following an interim period, the legislature granted the city a charter in 1789, under which the city was incorporated as "The Mayor, Aldermen and Citizens of Philadelphia."[7] It was in *this charter* that this Court found the inherent power of the city to act as Girard's trustee. *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia,* 43 U. S. (2 How.) 127, 186-189 (1844). Subsequent changes in the city and its government, such as the Consolidation Act of 1854 (Act of February 2, P. L. 21, 53 Purdon's Stat. § 6361 *et seq.*), have been held not to destroy the identity of the old corporation or alter its powers. *Girard v. Philadelphia,* 74 U. S. (7 Wall.) 1 (1869). The Act of June 30, 1869, P. L. 1276, creating the Board, was likewise held not to alter in any manner the identity or powers of the city as trustee. *Philadelphia v. Fox,* 64 Pa. 169 (1870). By virtue of its old charter the city has continued as a corporation to this day.

The competency of the city to act as trustee is not traceable to any of the statutes cited by appellants. Clearly the Act of 1869, which the appellants are challeng-

(7) The relevant portion of the Philadelphia Charter of 1789 is printed in appellee's appendix (App. 33a).

ing specifically, is not the source of the trustee's competency or of the acceptance of the trust; the trust was over 35 years old when that act was passed and that act did not change the trustee. *Philadelphia v. Fox*, 64 Pa. 169 (1870). The Acts of March 24 and April 4, 1832 (J. S. 6-7, 115-116), passed soon after Girard's death, did *not* authorize the city to accept the trust and did not even *purport* to be the source of the city's competency to act as trustee of the college. These statutes, which Girard requested, were passed to enable the city to make certain improvements to the eastern part of the city with gifts made by Girard's will. But these gifts had nothing whatever to do with Girard College, and the statutes had nothing to do with the city's trusteeship of the college. Girard requested no legislation whatsoever with respect to the college, and indeed he needed none. The whole of the Act of March 24, 1832, has been printed in appellee's appendix to show that the parts of that statute printed in appellants' appendix do not relate to the city's trusteeship of the college (App. 34a). A reading of these statutes, and of this Court's opinion in *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia*, 43 U. S. (2 How.) 127 (1844), wherein the city's competency to act as trustee was found to be inherent in its charter, demonstrates that appellants' statement that "the city was enabled to accept the gift . . . only by reason of state legislative enactments" (J. S. 4) is not correct.

Appellants refer to statutes of 1847 and 1853 respecting the statutory guardianship of the city and the indenture of apprentices (J. S. 7, 116-120). Contrary to appellants' argument, Girard did not stipulate that any such legislation be enacted (App. 18a, Article XXI, para. 5). Such statutes did nothing more than confer on the trustee the same powers any private trustee would have had.

Appellants list certain of the city ordinances. Not one of these is anything more than an administrative measure such as any private trustee would adopt for the orderly

conduct of its business. They simply represent the manner in which the trustee acted prior to the enactment of the Act of June 30, 1869, for obviously if a trustee is to perform its responsibilities it must act. Being a corporate body, the city had to carry out its duties as trustee through the procedures by which it operated. Any private corporate trustee would likewise follow its own rules. It will be noted that there are no ordinances after the Board was created in 1869. This Court should also note carefully that the "appropriations" referred to in these ordinances were not appropriations of public funds but appropriations of funds for the college out of Girard's trust.

The source of the city's competency to act as trustee does not lie in any of the public acts cited by appellants. Those acts did not purport to create the college or to establish the trust. They did not confer benefits either on the college or on its students. Those that had anything to do with the college were mere administrative measures detailing the administration of the trustee's powers conferred in the will. None of these measures enlarge the sole difference between Girard College and any other charitable trust—the trusteeship of a public corporation.

The above analysis of the statutes and ordinances relates to the source of the *competency* of the trustee. An entirely different and more important question is the source of the *power* of the trustee (which is treated in more detail *infra* p. 21)—appellants treat this in the same breath with the question of competency. None of the above statutes and ordinances, not even the Philadelphia charter of 1789, is the source of the *validity* of the trust or the *powers* of the trustee to execute it. The "foundation and support" of Girard College is Girard's will and the estate he accumulated. In *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia*, 43 U. S. (2 How.) 127 (1844), this Court held that the competency of the city to act as trustee lay in its inherent charter powers. Far more importantly, it held that even if the city were not competent

the trust would not fail; a trustee competent to act would be found (*Id.* at pp. 188-189). The trust was valid in any event and would be enforced in accordance with the terms of the will.

2. This Court Has No Jurisdiction, Either by Appeal or Certiorari, Because the Relief Requested Will Not Be Affected by a Decision on the Federal Question Presented.

It is well established that before this Court can assume jurisdiction there must be a case or controversy, and "it must appear that valuable legal rights asserted by the complainant are threatened with imminent invasion by defendants and will be directly affected to a specific and substantial degree by the decision of the questions of law presented in the case". *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States*, § 260, p. 467 (1951). This Court has held that it "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California v. San Pablo and Tulare R. R. Co.*, 149 U. S. 308, 314 (1893).

The "thing in issue" in this case is the right of two of the appellants to be admitted to Girard College. The federal question raised by appellants was that the operation of the college violates the Fourteenth Amendment because the trusteeship of the city constitutes "state action". The Pennsylvania courts decided that the city's trusteeship did not amount to "state action" in the slightest degree (a question dealt with *infra* p. 21).

The Supreme Court of Pennsylvania also decided that even if the trusteeship of the city were "state action", it could not grant appellants the remedy they seek (J. S. 39). Any vice in the operation of the college would lie in the competency of the city to serve as trustee, not in the validity of the trust itself. *Shelley v. Kraemer*, 334 U. S. 1, 13

(1948). The principle that a valid trust will not fail for want of a trustee was laid down in this very case, by this Court, which held that if the city did not have capacity to serve as trustee, a competent trustee would be appointed. *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia*, 43 U. S. (2 How.) 127, 188-189 (1844); *Girard v. Philadelphia*, 74 U. S. (7 Wall.) 1, 12-13 (1869). Many other Pennsylvania cases have followed this rule (J. S. 39-40).

Appellants say that this was "dictum", that there was an "observation" by the court below that it "might" substitute a private trustee for the Board (J. S. 21-22). The court below was not equivocal. The opinion flatly states that if the operation of the college is state action "petitioners would nevertheless not be entitled to the remedy they seek" (J. S. 39). "The law is clear that the remedy is, not to change that provision [prescribing poor white male orphans] . . . but for the Orphans' Court . . . to appoint another trustee" (J. S. 39). Thus the court held that as a matter of state law the prayer of appellants that Foust and Felder be admitted to Stephen Girard's college could not be granted. Appellants, apparently recognizing that a decision on the federal question would not affect the relief sought, did not attack the trustee as such but sought to have the will construed to eliminate the word "white". This the state courts refused to do.

Appellants assert that this non-federal basis for the decision should be ignored for two reasons. First, they say that the city improperly serves as trustee. But they do not ask that the trustee be removed; indeed they ask that the city continue as trustee, but for different beneficiaries. A decision by this Court that the city acts unlawfully will not accomplish the desires of anyone party to this litigation. Second, appellants say that removal of the trustee will not erase "the long history of extensive state and local government aid" (J. S. 22). The true nature of this alleged aid has already been dealt with (*supra* pp. 10-13). Appellant's argument is that Girard College has

been converted over the years into a public school simply through the trusteeship of the city. By the same token it could be said that a private trustee is entitled to the trust property if he administers it for a long enough time.

The court below has determined as a matter of state law that the trust being valid, Foust and Felder, non-beneficiaries of the trust, have no right to claim under it. Even if the federal question presented by appellants, which concerns itself with the competency of the trustee, should be deemed substantial, a contrary decision thereon by this Court will not affect any right of appellants or entitle them to the relief they seek.

3. This Court Has No Jurisdiction by Way of Appeal, No State Statute Having Been Drawn in Question as Being Repugnant to the Fourteenth Amendment.

Appellants, seeking jurisdiction by appeal, state that the federal question in issue involves the validity of the Act of June 30, 1869, P. L. 1276, 53 Purdon's Stat. § 6481 *et seq.* (J. S. 112), which created the Board for the discharge of the city's fiduciary duties. This statute was not drawn in question by any of the appellants in the state courts until the filing of their petition for reargument with the Pennsylvania Supreme Court. There was no decision whatever on this question by any of the courts below. Accordingly the question is not before this Court, and the appeal should be dismissed.

The litigation was initiated by a petition by the city for admission of appellants Foust and Felder to the college (R. 8a). In this petition the city's primary position, to which it devoted ten of its seventeen paragraphs, was that Girard's intention, and the terms of the will, were such that the will did not bar the admission of Foust and Felder. The petition also alleged that denial of their admission was contrary to the public policy of the city and state and that the Board's action violated the Fourteenth Amendment.

There were no allegations whatever that the Act of 1869 was invalid. At the same time petitions were also filed by Foust and Felder (R. 61a, 70a). These petitions likewise alleged that the will did not bar the petitioners, and that the action of the Board was contrary to public policy and violated the Fourteenth Amendment. They did not even *mention* the Act of 1869. The Board's answers to each of these petitions (R. 80a, 98a, 103a) were responsive to the allegations thereof and did not raise a question of or advert to the validity of the Act of 1869. Likewise the Commonwealth, in its petition (R. 116a), did not take the position that the Act of 1869 was unconstitutional.

Briefs and oral argument followed the pleadings. Not once did any of the appellants question the validity of the Act of 1869, or even advert to any issue in respect to it. Judge Bolger's 38-page opinion does not refer to, much less decide, any such issue (R. 119a). That opinion states the issue to be whether the word "white" should be eliminated from the will (R. 127a). The decision was that it could not be: Girard intended a college only for poor white male orphans. The federal question decided was whether the Board's action was "state action" (R. 131a), with respect to which appellants' contentions were that the will was a restrictive covenant that the court could not enforce, and that the operation of the college by the Board was a denial of equal protection of the laws (R. 133a-134a). The opinion's lengthy treatment of the federal question (R. 131a-149a) makes one brief reference to the Act of 1869, and that reference is purely historical.[8]

The city, the Commonwealth, and appellants Foust and Felder filed exceptions to Judge Bolger's decree to the Orphans' Court en banc (R. 156a, 161a, 165a). These ex-

(8) The court noted the case of *Philadelphia v. Fox*, 64 Pa. 169 (1870), where "the constitutionality of the Act of 1869 . . . was sustained" (R. 145a). This statement is simply a reference to the holding of that case that the transfer of fiduciary functions to the Board by the Act of 1869 was valid and not a violation of any "contract" with Girard.

ceptions, totalling 82 in number,[9] *contained not one word of reference to the Act of 1869,* or to any problem, constitutional or otherwise, in respect to it. In its opinion dismissing these exceptions (J. S. 170a-184a), the Orphans' Court made only a single oblique reference to the Act of 1869 (J. S. 178a), which had nothing whatever to do with its constitutionality.

The same story was repeated in the Supreme Court of Pennsylvania. There was not one word of argument, written or oral, directed to the Act of 1869. Nor is there a single word on any such question, much less a decision of any kind on it, in any of the opinions, including the dissenting opinion of Mr. Justice Musmanno.

It thus can be seen that the federal question argued by the parties throughout this litigation was whether the Board violated the Fourteenth Amendment in declining to approve the application for admission to the college of Foust and Felder because they are not "poor white male orphans, between the ages of six and ten years" as required by the will. This question involves the validity of the acts of individuals allegedly acting on behalf of the state and in violation of an asserted federal right of Foust and Felder. As such it is reviewable here, if at all, only by way of certiorari.

Subsequent to the judgment of the Supreme Court of Pennsylvania, appellants asserted, for the first time, that the question involved was the validity of the statute creating the Board. Their petition for reargument was dismissed without opinion, as a matter of discretion, by the Supreme Court under its Rule 69. This Court has stated many times that a federal question raised for the first time in a petition for reargument, and not decided by the state court, comes too late for review by this Court.[10] The same

(9) However, many are duplicates.

(10) *Radio Station WOW v. Johnson,* 326 U. S. 120, 128 (1945); *American Surety Co. v. Baldwin,* 287 U. S. 156 (1932); *Wall v. Chesapeake & Ohio Ry. Co.,* 256 U. S. 125 (1921); *Godchaux Co. v. Estopinal,* 251 U. S. 179 (1919); *St. Louis and*

rule holds where the questions actually argued below are reviewable only by certiorari and the appellant has attempted a direct appeal by challenging a state statute in a petition for reargument. *Jett Bros. Distilling Co. v. City of Carrollton*, 252 U. S. 1, 6 (1920); *Citizens National Bank of Cincinnati v. Durr*, 257 U. S. 99, 106 (1921); *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U. S. 182 185-187 (1945).

Appellants nevertheless say that they did raise the question of the validity of the Act of 1869, and that the Supreme Court of Pennsylvania did decide the question. They say that the city stated the question in its brief to the Orphans' Court and that the Commonwealth did the same in the Supreme Court. These statements appeared in the "Questions Involved" in the briefs.[11] This was at least a misnomer since such a question was not involved and no argument on either side, written or oral, was ever addressed to such a question. Appellants footnote their allegations with references to the argument portions of their briefs (J. S. 12-13, footnotes 9-10).[12] The implication that the question was argued in those portions of the briefs is without any justification whatever. Not one word was addressed to any question of the validity of the Act of 1869.

San Francisco R. Co. v. Shepherd, 240 U. S. 240 (1916); *Forbes v. State Council of Virginia*, 216 U. S. 396 (1910); *Waters-Pierce Oil Co. v. Texas (No. 2)*, 212 U. S. 112 (1909); *Corkran Oil and Development Co. v. Arnaudet*, 199 U. S. 182 (1905); *Loeber v. Schroeder*, 149 U. S. 580 (1893).

(11) By the use of the words "see also", appellants imply that *each of them* mentioned this question before both the Orphans' Court and the Supreme Court (J. S. 12-13, footnotes 9 and 10). Such an implication is totally unwarranted. Question No. 4 of the Commonwealth's brief, and Questions Nos. 2 and 3 of Foust and Felder's brief, in the Orphans' Court made no reference whatever, express or implied, to the Act of 1869. Question No. 1 of the city's brief, and Questions Nos. 2-4 of Foust and Felder's brief, in the Supreme Court likewise raised no question whatever regarding that statute.

(12) Pp. 14-27 of the Commonwealth's brief in the Orphans' Court (J. S. 12, footnote 4) made one brief reference to the Act of 1869 (p. 17 of that brief) in the course of discussing whether the

While a question concerning the Act of 1869 may thus have been obscurely noted, the statute can scarcely be said to have been "drawn in question" as required by 28 U. S. C. A. § 1257(2), in view of the history of the case outlined above.

Appellants appear to take the position that the Supreme Court necessarily decided the question in determining that the Board did not violate the Fourteenth Amendment by complying with Girard's will, although nowhere did the court describe the situation in appellants' terms: "city officials authorized to act under, and acting pursuant to, the Act of June 30, 1869, could exclude negroes" (J. S. 2). This is an argument that the decision on the constitutionality of an official's act is necessarily a decision on the validity of the statute creating his position or outlining his powers.

The cases cited above (p. 18), including *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U. S. 182 (1945), refute such an argument. None of appellants' cases support it. *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934), and *Atchison, Topeka & S. F. R. Co. v. Public Utilities Commission*, 346 U. S. 346 (1953), were decisions that rules promulgated by a state board or commission were themselves legislative acts reviewable by appeal. They have nothing to do with this case. *Dahnke-Walker Milling Company v. Bondurant*, 257 U. S. 282 (1921), involved a statute specifically drawn in question and on the validity of which the state court had expressly ruled. In *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948), the grounds for the state court's deci-

college was a "public function". Pp. 9-32 of Foust and Felder's brief in the Orphans' Court (*Ibid.*) only referred to the Act of 1869 to support their argument that the Board is an agent of the city (pp. 12-13 of that brief). Neither brief made any other reference whatever to that statute and nowhere raised any question of its constitutionality. The briefs in the Supreme Court of Pennsylvania (pp. 6-22 of the city's brief and pp. 8-37 of Foust and Felder's brief; J. S. 13, footnote 10) likewise did not raise any question whatever of the validity of the Act of 1869.

sion that the educational program was valid was that the statutes in question granted the Board the authority to establish the program. The state court held that these statutes contained a "mandate" to the Board (396 Ill. 14, 28 (1947)), and it was "this holding" that this Court found to be "sufficient to show that the validity of an Illinois statute was drawn in question" (333 U. S. at p. 206). There has been no similar decision by any state court in this case.

Whether or not appellants raised a question of the validity of the Act of 1869, such a question has nothing to do with this case. It is from the will, not the Act of 1869, that the Board derives its powers. That statute did not confer any benefits on anyone, much less the benefits in which appellants Foust and Felder now seek to share. The statute did not select the trustee and did not define its powers and duties. The source of all rights, privileges, powers and authority in this case is Girard's will. In the terms of the *McCollum* case, the "mandate" here is found in the will.

If adopted, appellants' argument would make virtually all Fourteenth Amendment cases reviewable by direct appeal. Since "state action" is necessary in such cases, and since any act by a public official is necessarily pursuant to some statute creating his office and conferring on him his powers, appellants' argument would make every decision on the constitutionality of the act of an official a decision on the validity of the statute under which he purported to act, even though that statute does no more than create the official's office. The distinction created by 28 U. S. C. A. § 1257(2) and § 1257(3) would cease to exist.

Further it should be noted that even if the trustee can be said to be "acting" under a statute or other state authority, rather than under the will, it is certainly not acting under the Act of 1869. That statute, which applied to all of the many trusts of which the city is trustee and not merely to the Girard Estate, simply created the Board. But the city, not the Board, is the trustee, and had been acting as such for over 35 years when the Act of 1869 was

passed. The Act of 1869 did not create a new trustee or substitute trustees. It simply transferred the administration of the trust from one city agency to another; the city itself continued as trustee. *Philadelphia v. Fox*, 64 Pa. 169 183 (1870).

Appellee, for the foregoing reasons, respectfully submits that the appeal should be dismissed.

4. Certiorari Should Be Denied Because the Supreme Court of Pennsylvania Did Not Decide a Federal Question of Substance.

Appellee submits that certiorari should be denied because the Supreme Court of Pennsylvania did not decide "a federal question of substance" under Rule 19(1)(a) of this Court. That court decided that the only possible distinction between Girard College and any other charitable trust —the trusteeship of the city—did not constitute a denial by the state of the equal protection of the laws. Neither Girard College nor any part of the Girard Estate belongs to the city or is in any manner public property. The city itself has long recognized this in its treatment of the college and of the trust property.[13] Not a penny of public funds has ever been spent on the college. Like any other trustee of a private trust, the Board must account to the Orphans' Court and not to the city. *Wilson v. Board of Directors of City Trusts*, 324 Pa. 545 (1936).[14]

Appellants say that regardless of whose property it is, it is "state action" for the city to refuse the applications of Foust and Felder. But it is not the city which determines who the students of the college shall be. As trustee, the city

(13) See the discussion of this by the court below, J. S. 71-72.

(14) Appellants point to the requirement in the Act of 1869 that the Board report periodically to the City Council and the state legislature. This requirement is subordinate to the primary duty of the Board to report to the Orphans' Court (*Wilson v. Board of Directors of City Trusts*, 324 Pa. 545, 553 (1936)), and it should be noted that Girard's will contains such a requirement (App. 28a, Article XXIV).

has no choice but to follow the directions in the will. The "discretion" which appellants mention (J. S. 6) refers only to the details of the organization of the college; Girard expressly enjoined the city from using his estate for any purposes other than those specified in his will. See Article XXIV of the will (App. 27a), and the opinions below (J. S. 40-41, 47-50). It is the will, not the city, or its agent the Board, or any state statute, which grants benefits to some, and in so doing necessarily denies them to others. The selection of students does not in any manner stem from state or city policy. Indeed, with the city and the state standing in their behalf in this litigation, appellants Foust and Felder can scarcely be called the victims of discriminatory state policy.

It is incorrect, therefore, for appellants to label the Act of 1869 "the effective source of power for the management of Girard College" (J. S. 9). If that phrase is intended as a test of "state action", it is not met here. No trustee of Girard College, be it a public body or a private trustee, could act otherwise than as the will dictates. The will, on the other hand, does not depend on the trusteeship of the city or the Board for its effectiveness. *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia,* 43 U. S. (2 How.) 127, 188-189 (1844).

In contending that the decision below creates a special status for one type of state activity, appellants not only assume their conclusion by labeling that activity "state action", they fail to recognize that the Board has long had a status so special that it is not even considered part of the governmental machinery of Philadelphia. The Act of 1869 itself was a measure designed to remove trusts administered by the city from the city government. *Philadelphia v. Fox,* 64 Pa. 169, 183 (1870). The Philadelphia City Charter expressly excludes the Board as an arm of the government in order "to protect its special status as trustee" (J. S. 38). The very manner in which this litigation has been treated by the city—bringing suit against itself

through orderly judicial processes—emphasizes the historic status of the Board.[15]

This case involves the right of an individual to leave his property for charitable purposes of his own choosing. It has always been a fundamental legal principle that a man at his death may leave his property to the persons of his choice (J. S. 30). A valid charitable gift does not require that all or even a large part of the public be permitted to share the gift. This right of every individual is protected by the state, which, as *parens patriae,* is defender of all charities, and which, through its laws and court system, supplies the guarantee that a charitable gift will be devoted to the purposes specified by the donor and not confiscated by others.

Girard did not have funds sufficient to found a college for the education of all poor children. To say that he practiced discrimination solely because he necessarily had to select a class of beneficiaries is to impugn not only his motives but the moral character of every individual who leaves his property to old ladies, or to Presbyterian ministers, or to Jews, or to a Roman Catholic convent, or to Indians. Yet throughout this litigation appellants have attempted to convince the state courts that selection, inevitably made by individual testators, is within the Fourteenth Amendment's prohibition against discrimination. They have sought to make this a Segregation Case.

If Girard discriminated against negroes, he also discriminated against girls and against children with fathers, however poor. Appellants Foust and Felder were not denied admission to the college because they were negroes but because they were *not* "poor white male orphans, be-

(15) Appellants emphasize that the City Treasurer is treasurer of the college (actually he is Treasurer of the Board, not the college; Act of 1869, § 3, J. S. 113) and that the Mayor and President of City Council are members of the Board. The Supreme Court of Pennsylvania noted that the reason for this had nothing to do with any special city control over the college (J. S. 38).

tween the ages of six and ten years". It should be noted that there are many more poor white male orphans than the college can accommodate; for every oriental, negro, Indian, female, or non-orphan admitted to the college, one of the class specified by Girard will be deprived of the benefits Girard desired to give him. If Girard discriminated, then every charity of whatever kind that is for the benefit of one religious group likewise discriminates. If the city's trusteeship is "state action", then the protection given by the state to all charities is likewise prohibited by the Fourteenth Amendment.

Of the thirteen judges who have studied this case, twelve concluded that this is neither a discrimination nor a "state action" case. In doing so, they decided not only the applicability of the Fourteenth Amendment, but the even more searching question of the public policy of the Commonwealth of Pennsylvania. It is stated with little fear of contradiction that the standards Pennsylvania has set for the relations of the races go far beyond the requirements of the Fourteenth Amendment. Discrimination has been prohibited in areas of "individual" as opposed to "state" action. Examples are the Pennsylvania Fair Employment Practice Act (Act of October 27, 1955, P. L. 744, 43 Purdon's Stat. § 951 *et seq.*), the Urban Redevelopment Act (Act of May 24, 1945, P. L. 991, § 11, 35 Purdon's Stat. § 1711(a)(8)), the Public Contracts Act (Act of May 1, 1933, P. L. 103, art. VIII, § 808, as amended, 53 Purdon's Stat. § 19093-808), and many others. Racial discrimination in public schools was abolished in 1881 (Act of June 8, 1881, P. L. 76, now found in Act of March 10, 1949, P. L. 30, art. XIII, § 1310, as amended, 24 Purdon's Stat. § 13-1310), long before this Court's decision in *Brown v Board of Education of Topeka,* 347 U. S. 483 (1954). In concluding that nothing in this case contravenes state policy, the Supreme Court of Pennsylvania applied standards higher and more far-reaching than the bare requirements of the Fourteenth Amendment.

This case involves the right of one man to confer his bounty on selected individuals; it involves his will. Girard's will admits only "poor white male orphans, between the ages of six and ten years" to but one private school—this in a city and state where there exist equal, non-segregated educational opportunities for everyone.

5. The Federal Question Was Correctly Decided.

The decision of the Supreme Court of Pennsylvania recognized that this case does not involve discrimination. Even if discrimination can be read into the case, its source is Girard and his will, not the state, the city or the Board. The court below concluded that the operation of Girard College "does not in the slightest degree represent state action" (J. S. 39).

This is in accord with every decided case. None of the Fourteenth Amendment cases cited by appellants involved a situation similar in any degree to the operation of Girard College. The instant case, unlike the housing project, swimming pool, and similar cases, does not involve public property.[16] In such cases the state is doing indirectly what it cannot do directly, with property dedicated to the use of all citizens. Nor does this case bear any resemblance to the cases where discrimination was decreed by statute or ordinance.[17]

Appellants cite cases for the proposition that individual action has been found unlawful under the Fourteenth Amendment. Some of these cases had nothing whatsoever to do with that Amendment but were cases involving the validity of private contracts under specific

(16) *Rudder v. United States*, 226 F. 2d 51 (D. C. Cir., 1955); *Baltimore City v. Dawson*, 350 U. S. 877 (1955); *Lawrence v. Hancock*, 76 F. Supp. 1004 (S. D. W. Va., 1948); *Department of Conservation and Development v. Tate*, 231 F. 2d 615 (4th Cir., 1956), *cert. denied*, 352 U. S. 838; *Muir v. Louisville Park Theatrical Ass'n*, 347 U. S. 971 (1954).

(17) *Brown v. Board of Education of Topeka*, 347 U. S. 483 (1954); *Buchanan v. Warley*, 245 U. S. 60 (1917).

statutes.[18] Other cases, such as *Terry v. Adams*, 345 U. S. 461 (1953), and *Marsh v. Alabama*, 326 U. S. 501 (1946), were cases where exclusive public functions such as voting and law enforcement had been in fact or in effect delegated by the state to private individuals. *Valle v. Stengel*, 176 F. 2d 697 (3d Cir., 1949), cited by appellants as being "in direct conflict" with the decision below (J. S. 16), involved an action under the civil rights statutes (now 42 U. S. C. A. §§ 1981-1983, 1985) wherein the issue was the sufficiency of the complaint, and the allegation was that a police officer had deprived plaintiffs of their rights to enter into contracts. It has nothing whatever to do with this case.

Finally, *Shelley v. Kraemer*, 334 U. S. 1 (1948), and *Barrows v. Jackson*, 346 U. S. 249 (1953), have no bearing on Girard College. The Board "is not acting as a sovereign or as an agency of or for the state" (conc. op. below, J. S. 80), unlike the courts enforcing the restrictive covenants in those cases, but solely as the agent of a private citizen. *No one has "acted" in this case to deprive appellants of any right.* As the court below noted, it was appellants Foust and Felder who sought state action to invalidate Girard's will (J. S. 80). In so far as Girard College is analogous to a restrictive covenant at all, this case is more nearly similar to *Charlotte Park and Recreation Commission v. Barringer*, 242 N. C. 311, 88 S. E. 2d 114 (1955), *cert. denied sub nom. Leeper v. Charlotte Park and Recreation Commission*, 350 U. S. 983 (1956), where a racially restrictive provision in a deed was held valid and allowed to take effect by reverter; no "state action" was involved.

Appellants contend that the Fourteenth Amendment prohibits state action of every kind, and that it is error to carve out a single exception for fiduciary functions (J. S. 14, 15, 18). But the "state action" prohibited by the Fourteenth Amendment does not proscribe all forms

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(18) *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944); *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192 (1944).

of state aid to individuals which may have the incidental effect of benefiting members of one race, religion or denomination. *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541 (1949), *cert. denied*, 339 U. S. 981 (1950), involving substantial state aid to a private housing project, and *Norris v. Mayor and City Council of Baltimore*, 78 F. Supp. 451 (D. Md., 1948), involving considerable aid, financial and otherwise, to a private school, were held not to constitute state action. In *Zorach v. Clauson*, 343 U. S. 306 (1952), this Court held that the degree to which the state there aided religious instruction did not violate the Fourteenth Amendment. The state participates when its agents probate wills, when municipal fire departments protect private dwellings, and when a city furnishes electricity and water to homes. But to our knowledge it has not yet been contended that, under the Fourteenth Amendment a will cannot be probated if it contains a bequest to one race or religion, or that the city cannot furnish water to homes of persons who discriminate in choosing their guests. It is not a question of "carving out" an exception to a limitless rule, but of drawing a proper line between what may fairly be said to be state action and what may fairly be said to be private action.[19]

None of the decided cases supports appellants' contention that the court below drew this line improperly. A trustee does not act for himself. This Court's decision in *Reuben Quick Bear v. Leupp*, 210 U. S. 50 (1908), included a discussion of the question whether the government's position as trustee of Indian funds impressed those funds with the prohibitions of the First Amendment (*Id.* at pp. 81-2). The mere fact that a public body was trustee

(19) "The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process". Concurring opinion of Messrs. Justices Frankfurter and Harlan, *In re Groban*, United States Supreme Court, February 25, 1957.

did not convert private property into public property, and the government did not "act" contrary to the First Amendment by paying out the funds to sectarian schools in compliance with the directions of the Indian beneficiaries. The position of the government in that case is the same as that of the city here.

If the city's trusteeship is within the prohibitions of the Fourteenth Amendment, no public body can act as trustee. If state participation in any degree is "state action", few charities are valid. Individual testators and donors of necessity exercise selection. If the validity of their selection is to be tested by the same standards as the "reasonableness" of "classifications" under the equal protection clause, a great number of charities now in existence must be declared invalid. Religious and racial distinctions cannot be indulged in by the state, but they are the foundation of an enormous number of charities and trusts. Until now there has been no question of their validity.

CONCLUSION.

The appeal should be dismissed for the reason that no state statute was drawn in question in the state courts, and there has been no decision on the validity of any state statute.

The appeal should be dismissed, and certiorari should be denied, for the further reason that the appeal (or petition) does not present a substantial federal question. In no event can appellants obtain the relief they seek.

Respectfully submitted,

JOSEPH P. GAFFNEY, SR.,
OWEN B. RHOADS,
Attorneys for Appellee.

Appendix.

APPENDIX A.

WILL OF STEPHEN GIRARD.

Dated February 16, 1830. Codicil dated June 20, 1831. Proved December 31, 1831.

Recorded Philada. Will Book 10, p. 198.

I, Stephen Girard, of the City of Philadelphia, in the Commonwealth of Pennsylvania, mariner and merchant, being of sound mind, memory, and understanding, do make and publish this my last will and testament, in manner following, that is to say . . .

I. I give and bequeath unto "The Contributors to the Pennsylvania Hospital," of which corporation I am a member, the sum of thirty thousand dollars, upon the following conditions, namely, that the said sum shall be added to their capital, and shall remain a part thereof forever, to be placed at interest and the interest thereof to be applied, in the first place to pay to my black woman Hannah (to whom I hereby give her freedom) the sum of two hundred dollars per year, in quarterly payments of fifty dollars each in advance, during all the term of her life; and, in the second place, the said interest to be applied to the use and accommodation of the sick in the said hospital, and for providing and at all times having competent matrons, and a sufficient number of nurses and assistant nurses, in order not only to promote the purposes of the said hospital, but to encrease this class of useful persons much wanted in our city:

II. I give and bequeath to "The Pennsylvania Institution for the Deaf and Dumb" the sum of twenty thousand dollars, for the use of that institution:

III. I give and bequeath to "The Orphan Asylum of Philadelphia," the sum of ten thousand dollars for the use of that Institution:

IV. I give and bequeath to "the Comptrollers of the public schools for the city and county of Philadelphia" the sum of ten thousand dollars for use of the schools upon the Lancaster system, in the first section of the first school district of Pennsylvania.

V. I give and bequeath to "The Mayor, Alderman and Citizens of Philadelphia," the sum of ten thousand dollars, in trust safely to invest the same in some productive fund, and with the interest and dividends arising therefrom to purchase fuel between the months of March and August in every year forever, and in the month of January in every year forever distribute the same, amongst poor white housekeepers and roomkeepers, of good character, residing in the city of Philadelphia.

VI. I give and bequeath to the society for the relief of poor and distressed masters of ships, their widows and children, (of which society I am a member) the sum of ten thousand dollars to be added to their capital stock, for the uses and purposes of said society.

VII. I give and bequeath to the gentlemen, who shall be trustees of the Masonic Loan at the time of my decease, the sum of twenty thousand dollars, including therein ten thousand and nine hundred dollars due to me, part of the Masonic Loan, and any interest that may be due thereon at the time of my decease, in trust for the use and benefit of "the Grand Lodge of Pennsylvania and masonic jurisdiction thereto belonging," and to be paid over by the said trustees to the said Grand Lodge for the purposes of being invested in some safe stock or funds, or other good security, and the dividends and interest arising therefrom to be again so invested and added to the capital, without applying any part thereof to any other purpose until the whole

capital shall amount to thirty thousand dollars, when the same shall forever after remain a permanent fund or capital, of the said amount of thirty thousand dollars, the interest whereof shall be applied from time to time to the relief of poor and respectable brethren: and in order that the real and benevolent purposes of masonic institutions may be attained, I recommend to the several lodges not to admit to membership, or to receive members from other lodges, unless the applicants shall absolutely be men of sound and good morals.

VIII. I give and bequeath unto Philip Peltz, John Lentz, Francis Hesley, Jacob Baker and Adam Young, of Passyunk township, in the county of Philadelphia, the sum of six thousand dollars, in trust that they or the survivors or survivor of them shall purchase a suitable piece of ground, as near as may be in the centre of said township, and thereon erect a substantial brick building, sufficiently large for a school house and the residence of a schoolmaster, one part thereof for poor male white children, and the other part for poor female white children of said township; and as soon as the said school-house shall have been built, that they the said trustees or the survivors or survivor of them shall convey the said piece of ground and house thereon erected, and shall pay over such balance of said sum as may remain unexpended, to any board of directors and their successors in trust, which may at the time exist or be by law constituted, consisting of at least twelve discreet inhabitants of the said township, and to be annually chosen by the inhabitants thereof; the said piece of ground and house to be carefully maintained by said directors and their successors solely for the purposes of a school as aforesaid forever, and the said balance to be securely invested as a permanent fund, the interest thereof to be applied from time to time towards the education in the said school of any number of such poor white children of said township; and I do hereby recommend to the citizens of the

said township to make additions to the fund whereof I have laid the foundation.

IX. I give and devise my house and lot of ground thereto belonging, situate in rue Ramouet aux Chartrons, near the city of Bordeaux, in France, and the rents issues and profits thereof to my brother Etienne Girard and my niece Victoire Fenellon (daughter of my late sister Sophia Girard Capayron) (both residing in France) in equal moieties for the life of my said brother, and, on his decease, one moiety of the said house and lot to my said niece Victoire and her heirs forever, and the other moiety to the six children of my said brother, namely John Fabricius, Marguerite, Anne Henriette, Jean August, Marie, and Madelaine Henriette, share and share alike (the issue of any deceased child if more than one to take amongst them the parent's share) and their heirs forever.

X. I give and bequeath to my said brother Etienne Girard the sum of five thousand dollars, and the like sum of five thousand dollars to each of his six children above named: if any of the said children shall die prior to the receipt of his or her legacy of five thousand dollars, the said sum shall be paid, and I give and bequeath the same, to any issue of such deceased child, if more than one share and share alike.

XI. I give and bequeath to my said niece Victoire Fenellon the sum of five thousand dollars.

XII. I give and bequeath absolutely to my niece Antoinetta, now married to Mr. Hemphill, the sum of ten thousand dollars, and I also give and bequeath to her the sum of fifty thousand dollars, to be paid over to a trustee or trustees to be appointed by my executors, which trustee or trustees shall place and continue the said sum of fifty thousand dollars upon good security, and pay the interest and dividends thereof as they shall from time to time accrue, to my said niece for her separate use, during the

term of her life, and from and immediately after her decease, to pay and distribute the capital to and among such of her children and the issue of deceased children, and in such parts and shares as she the said Antoinetta, by any instrument under her hand and seal executed in the presence of at least two credible witnesses shall direct and appoint, and for default of such appointment then to and among the said children and issue of deceased children in equal shares, such issue of deceased children if more than one to take only the share which their deceased parent would have taken if living.

XIII. I give and bequeath unto my niece Carolina, now married to Mr. Haslam, the sum of ten thousand dollars, to be paid over to a trustee or trustees to be appointed by my executors, which trustee or trustees shall place and continue the said money upon good security, and pay the interest and dividends thereof from time to time, as they shall accrue, to my said niece, for her separate use, during the term of her life; and, from and immediately after her decease, to pay and distribute the capital to and among such of her children and issue of deceased children, and in such parts and shares, as she the said Carolina, by any instrument under her hand and seal executed, in the presence of at least two credible witnesses, shall direct and appoint, and for default of such appointment, then to and among the said children and issue of deceased children, in equal shares, such issue of deceased children if more than one, to take only the share which the deceased parent would have taken if living: but if my said niece Carolina shall leave no issue, the said trustee or trustees on her decease shall pay the said capital and any interest accrued thereon to and among Caroline Lallemand (niece of the said Caroline) and the children of the aforesaid Antoinetta Hemphill, share and share alike.

XIV. I give and bequeath to my niece Henrietta, now married to Dr. Clark, the sum of ten thousand dollars; and

I give and bequeath to her daughter Caroline (in the last clause above named) the sum of twenty thousand dollars—the interest of the said sum of twenty thousand dollars, or so much thereof as may be necessary, to be applied to the maintenance and education of the said Caroline during her minority, and the principal with any accumulated interest to be paid to the said Caroline, on her arrival at the age of twenty-one years.

XV. Unto each of the captains, who shall be in my employment at the time of my decease, either in port or at sea, having charge of one of my ships or vessels, and having performed at least two voyages in my service, I give and bequeath the sum of fifteen hundred dollars—provided he shall have brought safely into the port of Philadelphia, or if at sea at the time of my decease shall bring safely into that port, my ship or vessel last entrusted to him, and also that his conduct during the last voyage shall have been in every respect conformable to my instructions to him.

XVI. All persons, who, at the time of my decease, shall be bound to me by indenture, as apprentices or servants, and who shall then be under age, I direct my executors to assign to suitable masters immediately after my decease, for the remainder of their respective terms, on conditions as favorable as they can in regard to education, clothing, and freedom dues; to each of the said persons, in my service and under age at the time of my decease I give and bequeath the sum of five hundred dollars, which sums respectively I direct my executors safely to invest in public stock, to apply the interest and dividends thereof towards the education of the several apprentices or servants, for whom the capital is given, respectively, and at the termination of the apprenticeship or service of each to pay to him or her the said sum of five hundred dollars and any interest accrued thereon, if any such interest shall remain unexpended: in assigning any indenture, preference shall be given to the mother, father, or next relation, as assignee,

should such mother, father, or relative desire it, and be at the same time respectable and competent.

XVII. I give and bequeath to Francis Hesley (son of Mrs. S. Hesley, who is mother of Marianne Hesley) the sum of one thousand dollars, over and above such sum as may be due to him at my decease.

XVIII. I charge my real estate in the state of Pennsylvania with the payment of the several annuities or sums following (the said annuities to be paid by the treasurer or other proper officer of the city of Philadelphia appointed by the corporation thereof for the purpose out of the rents and profits of said real estate, hereinafter directed to be kept constantly rented) namely:

1. I give and bequeath to Mrs. Elizabeth Ingersoll, widow of Jared Ingersoll, esq., late of the city of Philadelphia, counsellor at law, an annuity or yearly sum of one thousand dollars, to be paid in half yearly payments, in advance, of five hundred dollars each during her life:—

2. I give and bequeath to Mrs. Catherine Girard, now widow of Mr. J. B. Hoskins, who died in the isle of France, an annuity or yearly sum of four hundred dollars, to be paid in half yearly payments in advance of two hundred dollars each, during her life.

3. I give and bequeath to Mrs. Jane Taylor, my present housekeeper (the widow of the late captain Alexander Taylor, who was master of my ship Helvetius and died in my employment) an annuity or yearly sum of five hundred dollars, to be paid in half yearly payments in advance of two hundred and fifty dollars each, during her life.

4. I give and bequeath to Mrs. S. Hesley, my housekeeper at my place in Passyunk Township, an annuity or yearly sum of five hundred dollars, to be paid in half yearly payments in advance of two hundred and fifty dollars each during her life.

5. I give and bequeath to Marianne Hesley, daughter of Mrs. S. Hesley, an annuity or yearly sum of three hundred dollars, to be paid to her mother for her use in half yearly payments in advance of one hundred and fifty dollars each, until the said Marianne shall have attained the age of twenty-one years, when the said annuity shall cease, and the said Marianne will receive the five hundred dollars given to her and other indented persons, according to clause XVI. of this will:

6. I give and bequeath to my late house-keeper, Mary Kenton, an annuity or yearly sum of three hundred dollars to be paid in half yearly payments in advance of one hundred and fifty dollars each during her life.

7. I give and bequeath to Mrs. Deborah Scott, sister of Mary Kenton, and wife of Mr. Edwin T. Scott, an annuity or yearly sum of three hundred dollars, to be paid in half yearly payments in advance of one hundred and fifty dollars each, during her life.

8. I give and bequeath to Mrs. Catherine McLaren, sister of Mary Kenton, and wife of Mr. M. McLaren, an annuity or yearly sum of three hundred dollars, to be paid in half yearly payments in advance of one hundred and fifty dollars each, during her life.

9. I give and bequeath to Mrs. Amelia G. Taylor, wife of Mr. Richd M. Taylor, an annuity or yearly sum of three hundred dollars to be paid in half yearly payments in advance of one hundred and fifty dollars each during her life.

XIX. All that part of my real and personal estate, near Washita, in the state of Louisiana, the said real estate consisting of upwards of two hundred and eight thousand arpens or acres of land, and including therein the settlement hereinafter mentioned, I give, devise, and bequeath, as follows, namely: 1. I give devise and bequeath to the co poration of the City of New Orleans, their successors and assigns, all that part of my real estate, constituting the

settlement formed on my behalf by my particular friend Judge Henry Bree, of Washita, consisting of upwards of one thousand arpens or acres land with the appurtenances and improvements thereon, and also all the personal estate thereto belonging and thereon remaining, including upwards of thirty slaves now on said settlement and their encrease, in trust, however, and subject to the following reservations: I desire, that no part of the said estate or property, or the slaves thereon, or their encrease, shall be disposed of or sold for the term of twenty years from and after my decease, should the said judge Henry Bree survive me and live so long, but that the said settlement shall be kept up by the said judge Henry Bree, for and during said term of twenty years, as if it was his own, that is, it shall remain under his sole care and control, he shall improve the same by raising such produce as he may deem most advisable, and, after paying taxes and all expenses in keeping up the settlement by clothing the slaves and otherwise, he shall have and enjoy for his own use all the nett profits of said settlement—provided however and I desire that the said judge Henry Bree shall render annually to the corporation of the City of New Orleans, a report of the state of the settlement, the income and expenditure thereof, the number and encrease of the slaves, and the nett result of the whole. I desire that, at the expiration of the said term of twenty years, or on the decease of the said Judge Henry Bree, should he not live so long, the land and improvement forming said settlement, the slaves thereon or thereto belonging, and all other appurtenant personal property, shall be sold, as soon as the said Corporation shall deem it advisable to do so, and the proceeds of the said sale or sales shall be applied by the said corporation to such uses and purposes as they shall consider most likely to promote the health and general prosperity of the inhabitants of the City of New Orleans: But, until the said sale shall be made, the said corporation shall pay all taxes, prevent waste or intrusion, and so manage the said settle-

ment and the slaves and their encrease thereon, as to derive an income, and the said income shall be applied from time to time, to the same uses and purposes for the health and general prosperity of the said inhabitants. 2. I give devise and bequeath to the Mayor Aldermen and citizens of Philadelphia, their successors and assigns, two undivided third parts of all the rest and residue of my said real estate, being the lands unimproved near Washita in the said state of Louisiana, in trust, that, in common with the corporation of the city of New Orleans, they shall pay the taxes on the said lands, and preserve them from waste or intrusion, for the term of ten years from and after my decease, and, at the end of the said term, when they shall deem it advisable to do so, shall sell and dispose of their interest in said lands gradually from time to time, and apply the proceeds of such sales to the same uses and purposes hereinafter declared and directed of and concerning the residue of my personal estate. 3. And I give devise and bequeath to the Corporation of the city of New Orleans, their successors and assigns, the remaining one undivided third part of the said lands, in trust, in common with the Mayor Aldermen and citizens of Philadelphia, to pay the taxes on the said lands and preserve them from waste and intrusion for the term of ten years from and after my decease, and, at the end of the said term when they shall deem it advisable to do so, to sell and dispose of their interest in said lands gradually from time to time, and to apply the proceeds of such sales to such uses and purposes as the said corporation may consider most likely to promote the health and general prosperity of the inhabitants of the City of New Orleans.

XX. And whereas I have been for a long time impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance they are exposed; and I am particularly desirous to provide for

such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds: And whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior: Now, I do give devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind and wheresoever situate (the real estate in Pennsylvania charged as aforesaid) unto "The Mayor, Aldermen and citizens of Philadelphia their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned and declared of and concerning the same, that is to say: So far as regards my real estate in Pennsylvania, in trust, that no part thereof shall ever be sold or alienated by the said The Mayor Aldermen and citizens of Philadelphia or their successors, but the same shall forever thereafter be let from time to time to good tenants, at yearly or other rents and upon leases in possession not exceeding five years from the commencement thereof, and that the rents issues and profits arising therefrom shall be applied towards keeping that part of the said real estate situate in the city and Liberties of Philadelphia constantly in good repair (parts elsewhere situate to be kept in repair by the tenants thereof respectively) and towards improving the same whenever necessary by erecting new buildings, and that the net residue (after paying the several annuities herein before provided for) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate: And so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Burmley, in trust to sell and dispose of the same, whenever it may be expedient to do so, and to apply the proceeds of

such sale to the same uses and purposes as are herein declared of and concerning the residue of my personal estate.

XXI. And so far as regards the residue of my personal estate, in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary—in erecting as soon as practicably may be, in the centre of my square of ground between High and Chestnut streets and Eleventh and Twelfth streets in the city of Philadelphia (which square of ground I hereby devote for the purposes hereinafter stated, and for no other, forever) a permanent College, with suitable out-buildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established; and in supplying the said college and out-buildings with decent and suitable furniture, as well as books and all other things needful to carry into effect my general design. The said College shall be constructed with the most durable materials and in the most permanent manner, avoiding needless ornament, and attending chiefly to the strength, convenience and neatness of the whole: It shall be at least one hundred and ten feet east and west, and one hundred and sixty feet north and south, and shall be built on lines parallel with High and Chestnut streets and Eleventh and Twelfth streets, provided those lines shall constitute at their junction right angles: It shall be three stories in height, each story at least fifteen feet high in the clear from the floor to the cornice: It shall be fire-proof inside and outside, the floors and the roof to be formed of solid materials, on arches turned on proper centres, so that no wood may be used, except for doors, windows and shutters: Cellars shall be made under the whole building, solely for the purposes of the institution; the doors to them from the outside shall be on the east and west of the building, and access to them from the inside shall be had by steps, descending to the cellar floor from each

of the entries or halls hereinafter mentioned, and the inside cellar doors to open under the stairs on the north-east and north-west corners of the northern entry, and under the stairs on the south-east and south-west corners of the southern entry; there should be a cellar window under and in a line with each window in the first story—they should be built one half below, the other half above, the surface of the ground, and the ground outside each window should be supported by stout walls; the sashes should open inside, on hinges, like doors, and there should be strong iron bars outside each window; the windows inside and outside should not be less than four feet wide in the clear: There shall be in each story, four rooms, each room not less than fifty feet square in the clear; the four rooms on each floor to occupy the whole space east and west on such floor or story, and the middle of the building north and south; so that in the north of the building, and in the south thereof, there may remain a space, of equal dimensions, for an entry or hall in each, for stairs and landings: In the north-east and in the north-west corners of the northern entry or hall on the first floor, stairs shall be made so as to form a double staircase, which shall be carried up through the several stories; and, in like manner, in the south-east and south-west corners of the southern entry or hall, stairs shall be made, on the first floor, so as to form a double stair-case, to be carried up through the several stories; the steps of the stairs to be made of smooth white marble with plain square edges, each step not to exceed nine inches in the rise, nor to be less than ten inches in the tread: the outside and inside foundation walls shall be at least ten feet high in the clear from the ground to the ceiling: the first floor shall be at least three feet above the level of the ground around the building, after that ground shall have been so regulated as that there shall be a gradual descent from the centre to the sides of the square formed by High and Chestnut, and Eleventh and Twelfth streets: all the outside foundation walls, forming the cellars, shall be three feet and six inches

thick up to the first floor, or as high as may be necessary to fix the centres for the first floor; and the inside foundation wall, running north and south, and the three inside foundation walls running east and west, (intended to receive the interior walls for the four rooms each not less than fifty feet square in the clear, above mentioned) shall be three feet thick up to the first floor, or as high as may be necessary to fix the centres for the first floor: when carried so far up, the outside walls shall be reduced to two feet in thickness, leaving a recess outside of one foot and inside six inches—and when carried so far up, the inside foundation walls shall also be reduced, six inches on each side, to the thickness of two feet; centres shall then be fixed on the various recesses of six inches throughout, left for the purpose, the proper arches shall be turned, and the first floor laid: the outside and the inside walls shall then be carried up of the thickness of two feet throughout, as high as may be necessary to begin the recess intended to fix the centres for the second floor, that is the floor for the four rooms each not less than fifty feet square in the clear, and for the landing in the north, and the landing in the south, of the building, where the stairs are to go up—at this stage of the work, a chain, composed of bars of inch square iron, each bar about ten feet long, and linked together by hooks formed of the ends of the bars, shall be laid straitly and horizontally along the several walls, and shall be as tightly as possible worked into the centre of them throughout, and shall be secured wherever necessary, especially at all the angles, by iron clamps solidly fastened, so as to prevent cracking or swerving in any part; centres shall then be laid, the proper arches turned for the second floor and landings, and the second floor and landings shall be laid: the outside and the inside walls shall then be carried up of the same thickness of two feet throughout as high as may be necessary to begin the recess intended to fix the centres for the third floor and landings; and, when so far carried up, another chain similar in all respects to

that used at the second story, shall be in like manner worked into the walls throughout as tightly as possible, and clamped in the same way with equal care; centres shall be formed, the proper arches turned, and the third floor landings shall be laid: the outside and the inside walls shall then be carried up, of the same thickness of two feet throughout, as high as may be necessary to begin the recess intended to fix the centres for the roof; and, when so carried up, a third chain, in all respects like those used at the second and third stories, shall in the manner before described be worked as tightly as possible into the walls throughout, and shall be clamped with equal care; centres shall now be fixed in the manner best adapted for the roof, which is to form the ceiling for the third story, the proper arches shall be turned, and the roof shall be laid as nearly horizontally as may be, consistently with the easy passage of water to the eaves: the outside walls, still of the thickness of two feet throughout, shall then be carried up about two feet above the level of the platform, and shall have marble capping, with a strong and neat iron railing thereon: The outside walls shall be faced with slabs or blocks of marble or granite, not less than two feet thick, and fastened together with clamps securely sunk therein—they shall be carried up flush from the recess of one foot formed at the first floor where the foundation outside wall is reduced to two feet: The floors and landings as well as the roof shall be covered with marble slabs, securely laid in mortar; the slabs on the roof to be twice as thick as those on the floors. In constructing the walls, as well as in turning the arches, and laying the floors, landings, and roof, good and strong mortar, and grout, shall be used, so that no cavity whatever may any where remain. A furnace or furnaces for the generation of heated air shall be placed in the cellar, and the heated air shall be introduced in adequate quantity wherever wanted by means of pipes and flues inserted and made for the purpose in the walls, and as those walls shall be constructed. In case it shall be found expedient, for

the purposes of a library or otherwise, to encrease the number of rooms by dividing any of those directed to be not less than fifty feet square in the clear, into parts, the partition walls to be of solid materials. A room most suitable for the purpose, shall be set apart for the reception and preservation of my books and papers, and I direct that they shall be placed there by my executors and carefully preserved therein. There shall be two principal doors of entrance into the college, one into the entry or hall on the first floor in the north of the building, and in the centre between the east and west walls, the other into the entry or hall in the south of the building, and in the centre between the east and west walls; the dimensions to be determined by a due regard to the size of the entire building, to that of the entry, and to the purposes of the doors. The necessity for, as well as the position and size of other doors, internal or external, and also the position and size of the windows, to be, in like manner, decided on by a consideration of the uses to which the building is to be applied, the size of the building itself and of the several rooms and of the advantages of light and air: there should in each instance be double doors, those openings into the rooms to be what are termed glass doors, so as to encrease the quantity of light for each room, and those opening outward to be of substantial wood work well lined and secured: the windows of the second and third stories I recommend to be made in the style of those in the first and second stories of my present dwelling house North Water street, on the eastern front thereof; and outside each window I recommend that a substantial and neat iron balcony be placed sufficiently wide to admit the opening of the shutters against the walls; the windows of the lower story to be in the same style, except that they are not to descend to the floor, but so far as the surbase, up to which the wall is to be carried, as is the case in the lower story of my house at my place in Passyunk township. In minute particulars, not here noticed, utility and good taste should determine. There should be

at least four out-buildings, detached from the main edifice and from each other, and in such positions as shall at once answer the purposes of the institution, and be consistent with the symmetry of the whole establishment:—each building should be, as far as practicable, devoted to a distinct purpose: in that one or more of those buildings, in which they may be most useful, I direct my executors to place my plate and furniture of every sort. The entire square, formed by High and Chestnut streets, and Eleventh and Twelfth streets, shall be enclosed with a solid wall, at least fourteen inches thick and ten feet high, capped with marble and guarded with irons on the top so as to prevent persons from getting over: there shall be two places of entrance into the square, one in the centre of the wall facing High street, and the other in the centre of the wall facing Chestnut street: at each place of entrance there shall be two gates, one opening inward and the other outward; those opening inward to be of iron and in the style of the gates north and south of my banking house, and those opening outward to be of substantial wood work well lined and secured on the faces thereof with sheet iron. The messuages now erected on the south-east corner of High and Twelfth streets, and on Twelfth street, to be taken down and removed, as soon as the College and out-buildings shall have been erected, so that the establishment may be rendered secure and private.

When the college and appurtenances shall have been constructed, and supplied with plain and suitable furniture, and books, philosophical and experimental instruments and apparatus, and all other matters needful to carry my general design into execution; the income issues and profits of so much of the said sum of two millions of dollars as shall remain unexpended shall be applied to maintain the said college according to my directions:

1. The institution shall be organized as soon as practicable, and, to accomplish that purpose more effectually, due public notice of the intended opening of the college

shall be given—so that there may be an opportunity to make selections of competent instructors, and other agents, and those who may have the charge of orphans may be aware of the provision intended for them:

2. A competent number of instructors, teachers, assistants and other necessary agents, shall be selected, and when needful their places from time to time supplied; they shall receive adequate compensation for their services: but no person shall be employed, who shall not be of tried skill in his or her proper department, of established moral character—and in all cases persons shall be chosen on account of their merit, and not through favor or intrigue.

3. As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible; and from time to time as there may be vacancies, or as increased ability from income may warrant, others shall be introduced.

4. On the application for admission, an accurate statement should be taken, in a book prepared for the purpose, of the name, birthplace, age, health, condition as to relatives, and other particulars, useful to be known, of each orphan.

5. No orphan should be admitted until the guardians or directors of the poor, or a proper guardian, or other competent authority, shall have given, by indenture, relinquishment, or otherwise, adequate power to the Mayor, Aldermen and citizens of Philadelphia, or to directors or others by them appointed, to enforce, in relation to each orphan, every proper restraint, and to prevent relatives or others from interfering with or withdrawing such orphan from the institution.

6. Those orphans, for whose admission application shall first be made, shall be first introduced, all other things concurring—and at all future times priority of application

shall entitle the applicant to preference in admission, all other things concurring: but, if there shall be at any time more applicants than vacancies, and the applying orphans shall have been born in different places, a preference shall be given,—first to orphans born in the city of Philadelphia; secondly, to those born in any other part of Pennsylvania; thirdly to those born in the city of New York (that being the first port on the continent of North America, at which I arrived); and lastly, to those born in the city of New Orleans, being the first port on the said continent at which I first traded, in the first instance as first officer, and subsequently as master and part owner of a vessel and cargo.

7. The orphans, admitted into the College, shall be there fed with plain but wholesome food, clothed with plain but decent apparel (no distinctive dress ever to be worn) and lodged in a plain but safe manner: Due regard shall be paid to their health, and to this end their persons and clothes shall be kept clean, and they shall have suitable and rational exercise and recreation: They shall be instructed in the various branches of a sound education, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the French and Spanish languages (I do not forbid, but I do not recommend, the Greek and Latin Languages)—and such other learning and science, as the capacities of the several scholars may merit or warrant: I would have them taught facts and things, rather than words or signs: And, especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars.

8. Should it unfortunately happen, that any of the orphans, admitted into the college, shall, from malconduct, have become unfit companions for the rest, and mild means

of reformation prove abortive, they should no longer remain therein.

9. Those scholars, who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age; they shall then be bound out by the Mayor Aldermen and citizens of Philadelphia, or under their direction, to suitable occupations, as those of agriculture, navigation, arts, mechanical trades, and manufactures, according to the capacities and acquirements of the scholars respectively; consulting, as far as prudence shall justify it, the inclinations of the several scholars, as to the occupation, art, or trade, to be learned.

In relation to the organization of the college and its appendages, I leave, necessarily, many details to the Mayor Aldermen and citizens of Philadelphia and their successors; and I do so, with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia, will observe and evince especial care and anxiety in selecting members for their City Councils, and other agents: There are, however, some restrictions, which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely: first, I enjoin and require, that, if, at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but, in no event, shall any part of the said capital be sold, disposed of, or pledged, to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof exclusively: secondly, I enjoin and require, that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty what-

ever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college:— . . . In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitements, which clashing doctrines and sectarian controversy are so apt to produce; My desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.

. . . If the income, arising from that part of the said sum of two millions of dollars, remaining after the construction and furnishing of the college and out-buildings, shall, owing to the encrease of the number of orphans, applying for admission, or other cause, be inadequate to the construction of new buildings, or the maintenance and education of as many orphans as may apply for admission, then such further sum as may be necessary for the construction of new buildings and the maintenance and education of such further number of orphans, as can be maintained and instructed within such buildings as the said square of ground shall be adequate to, shall be taken from the final residuary fund hereinafter expressly referred to for the purpose, comprehending the income of my real estate in the city and county of Philadelphia, and the dividends of my stock in the Schuylkill navigation company—my design and desire being, that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate.

XXII. And as to the further sum of five hundred thousand dollars, part of the residue of my personal estate, in trust, to invest the same securely, and to keep the same so invested, and to apply the income thereof exclusively to the following purposes, that is to say:

1. To lay out, regulate, curb, light and pave a passage or street, on the east part of the city of Philadelphia, fronting the river Delaware, not less than twenty-one feet wide, and to be called Delaware Avenue, extending from South or Cedar street, all along the east part of Water street squares, and the west side of the logs, which form the heads of the docks, or thereabouts; and to this intent to obtain such acts of Assembly, and to make purchases or agreements, as will enable the Mayor Aldermen and citizens of Philadelphia to remove or pull down all the buildings, fences and obstructions, which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue;—to fill up the heads of such of the docks as may not afford sufficient room for the said street;—to compel the owners of wharves to keep them clean and covered completely with gravel or other hard materials, and to be so levelled that water will not remain thereon after a shower of rain,—to completely clean and keep clean all the docks within the limits of the city, fronting on the Delaware;—and to pull down all platforms carried out, from the east part of the city over the river Delaware, on piles or pillars.

2. To pull down and remove all wooden buildings, (as well those made of wood and other combustible materials, as those called brick-paned or frame buildings filled in with bricks) that are erected within the limits of the City of Philadelphia—and also to prohibit the erection of any such buildings within the said city's limits at any future time.

3. To regulate, widen, pave, and curb Water street, and to distribute the Schuylkill water therein upon the fol-

lowing plan that is to say, . . . that Water street be widened east and west from Vine street all the way to South street, in like manner as it is from the front of my dwelling to the front of my stores on the west side of Water street, and the regulation of the curbstones continued at the same distance from one another, as they are at present opposite to the said dwelling and stores, so that the regulation of the said street be not less than thirty-nine feet wide, and afford a large and convenient foot-way, clear of obstructions and incumbrances of every nature, and the cellar doors on which, if any shall be permitted, not to extend from the buildings on to the foot-way more than four feet; the said width to be encreased gradually, as the fund shall permit, and as the capacity to remove impediments shall encrease, until there shall be a correct and permanent regulation of Water street on the principles above stated, so that it may run north and south as strait as possible: That the ten feet middle alleys, belonging to the public, and running from the centre of the east squares to Front street, all the way down across Water street to the river Delaware, be kept open and cleansed as city property, all the way from Vine to South street—that such part of each centre or middle alley as runs from Front to Water street be arched over with bricks or stone, in so strong a manner as to facilitate the building of plain and permanent stone steps and plat-forms, so that they may be washed and kept constantly clean: and that the continuance of the said alleys, from the east side of Water street be curbed all the way to the river Delaware and kept open forever—. . . (I understand that those middle or centre alleys were left open in the first plan of the lots, on the east front of the city, which were granted from the east side of Front street to the river Delaware, and that each lot on said east front has contributed to make those alleys by giving a part of their ground in proportion to the size of each lot; those alleys were in the first instance, and still are, considered public property, intended for the convenience of the in-

habitants residing in Front street to go down to the river for water and other purposes; but, owing to neglect or to some other cause, on the part of those, who have had the care of city property, several encroachments have been made on them by individuals, by wholly occupying, or building over, them, or otherwise, and in that way the inhabitants, more particularly those who reside in the neighborhood, are deprived of the benefit of that wholesome air, which their opening and cleansing throughout would afford): That the iron pipes, in Water street, which, by being of smaller size than those in the other streets, and too near the surface of the ground, cause constant leaks, particularly in the winter season, which in many places render the street impassable, be taken up and replaced by pipes of the same size quality and dimensions in every respect, and laid down as deeply from the surface of the ground, as the iron pipes, which are laid in the main streets of the City: . . . and as it respects pumps for Schuylkill water and fire-plugs in Water street, that one of each be fixed at the south-west corner of Vine and Water streets, and so running southward, one of each near the steps of the centre alley going up to Front street; one of each at the south-west corner of Sassafras and Water streets, one of each near the steps of the centre alley going up to Front street, and so on at every south-west corner of all the main streets and Water street, and of the centre alleys of every square, as far as South or Cedar street; and when the same shall have been completed, that all Water street shall be repaved by the best workmen in the most complete manner, with the best paving water-stones, after the height of the curbstones shall have been regulated throughout, as well as the ascent and descent of the street, in such manner as to conduct the Water through the main streets and the centre alleys to the river Delaware, as far as practicable; and whenever any part of the street shall want to be raised, to use nothing but good paving gravel for that

purpose, so as to make the paving as permanent as possible: . . . By all which improvements, it is my intention to place and maintain the section of the city above referred to in a condition which will correspond better with the general cleanness and appearance of the whole city, and be more consistent with the safety, health, and comfort of the citizens. And my mind and will are, that all the income, interest and dividends of the said capital sum of five hundred thousand dollars shall be yearly and every year expended upon the said objects, in the order in which I have stated them as closely as possible, and upon no other objects until those enumerated shall have been attained: and, when those objects shall have been accomplished, I authorize and direct the said The Mayor Aldermen and Citizens to apply such part of the income of said capital sum of five hundred thousand dollars as they may think proper to the further improvement, from time to time, of the eastern or Delaware front of the City.

XXIII. I give and bequeath to the Commonwealth of Pennsylvania, the sum of three hundred thousand dollars, for the purposes of internal improvement by canal navigation, to be paid into the state treasury by my executors, as soon as such laws shall have been enacted by the constituted authorities of the said commonwealth as shall be necessary, and amply sufficient to carry into effect, or to enable the constituted authorities of the city of Philadelphia to carry into effect, the several improvements above specified; namely, 1. laws, to cause Delaware avenue, as above described, to be made, paved, curbed, and lighted; to cause the buildings, fences, and other obstructions now existing to be abated and removed; and to prohibit the erection of any such obstructions to the eastward of said Delaware avenue; 2. laws, to cause all wooden buildings as above described to be removed, and to prohibit their future erection within the limits of the city of Philadelphia; 3. laws, providing for the gradual widening, regulating, paving, and

curbing of Water street, as hereinbefore described, and also for the repairing the middle alleys, and introducing the Schuylkill water, and pumps, as before specified—all which objects, may, I persuade myself, be accomplished on principles at once just into relation to individuals, and highly beneficial to the public: the said sum, however, not to be paid, unless said laws be passed within one year after my decease.

XXIV. And as it regards the remainder of said residue of my personal estate, in trust, to invest the same in good securities, and in like manner to invest the interest and income thereof from time to time, so that the whole shall form a permanent fund; and to apply the income of the said fund:—

1. To the further improvement and maintenance of the aforesaid College as, directed in the last paragraph of the XXIst clause of this will.

2. To enable the Corporation of the City of Philadelphia to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, including a sufficient number of watchmen really suited to the purpose; and to this end, I recommend a division of the city, into watch districts or four parts, each under a proper head, and that at least two watchmen shall in each round or station patrol together.

3. To enable the said corporation to improve the city property, and the general appearance of the city itself; and, in effect to diminish the burden of taxation, now most oppressive especially on those, who are the least able to bear it:

To all which objects, the prosperity of the City, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year for ever—after providing

for the College as hereinbefore directed, as my primary object. But, if the said city shall knowingly and wilfully violate any of the conditions hereinabove and hereinafter mentioned, then I give and bequeath the said remainder and accumulations to the Commonwealth of Pennsylvania, for the purposes of internal navigation, excepting however, the rents issues and profits of my real estate in the City and County of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid College, in the manner specified in the last paragraph of the XXIst clause of this will: And, if the Commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes before mentioned, or shall apply any part thereof to any other use, or shall for the term of one year, from the time of my decease, fail or omit to pass the laws hereinbefore specified for promoting the improvement of the city of Philadelphia, then I give devise and bequeath the said remainder and accumulations (the rents aforesaid always excepted and reserved for the College as aforesaid) to the United States of America for the purposes of internal navigation and no other.

Provided, nevertheless, and I do hereby declare, that all the preceding bequests and devises of the residue of my estate to The Mayor, Aldermen and Citizens of Philadelphia, are made upon the following express conditions, that is to say—First, that none of the monies, principal, interest, dividends, or rents, arising from the said residuary devise and bequest, shall at any time be applied to any other purpose or purposes whatever than those herein mentioned and appointed:—Second, that separate accounts, distinct from the other accounts of the corporation, shall be kept by the said corporation, concerning the said devise, bequest, college and funds, and of the investment and application thereof; and that a separate account or accounts of the same shall be kept in bank, not blended with any other account, so that it may at all times appear on examination by a committee of the legislature as hereinafter mentioned,

that my intentions had been fully complied with:—Third, that the said corporation render a detailed account annually in duplicate to the legislature of the Commonwealth of Pennsylvania, at the commencement of the session, one copy for the senate and the other for the house of representatives, concerning the said devised and bequeathed estate, and the investment and application of the same, and also a report in like manner of the state of the said College, and shall submit all their books papers and accounts touching the same, to a committee or committees of the legislature for examination, when the same shall be required: Fourth, the said corporation shall also cause to be published in the month of January annually, in two or more newspapers printed in the city of Philadelphia, a concise but plain account of the state of the trusts, devises, and bequests herein declared and made, comprehending the condition of the said college, the number of scholars, and other particulars needful to be publicly known, for the year next preceding the said month of January, annually.

XXV. And whereas I have executed an assignment in trust of my banking establishment, to take effect the day before my decease, to the intent that all the concerns thereof may be closed by themselves, without being blended with the concerns of my general estate, and the balance remaining to be paid over to my executors: Now, I do hereby direct my executors, hereinafter mentioned, not to interfere with the said trust in any way except to see that the same is faithfully executed, and to aid the execution thereof by all such acts and deeds as may be necessary and expedient to effectuate the same, so that it may be speedily closed, and the balance paid over to my executors, to go, as in my will, into the residue of my estate: And I do hereby authorise direct and empower the said trustees from time to time, as the capital of the said bank shall be received, and shall not be wanted for the discharge of the debts due thereat, to

invest the same in good securities in the names of my executors, and to hand over the same to them, to be disposed of according to this my will.

XXVI. Lastly—I do hereby nominate and appoint Timothy Paxson, Thomas P. Cope, Joseph Roberts, William J. Duane, and John A. Barclay . . . executors of this my last will and testament: I recommend to them to close the concerns of my estate as expeditiously as possible, and to see that my intentions in respect to the residue of my estate are and shall be strictly complied with; and I do hereby revoke all other wills by me heretofore made.

In witness, I, the said Stephen Girard have to this my last will and testament, contained in thirty-five pages, set my hand at the bottom of each page, and my hand and seal at the bottom of this page; the said will executed, from motives of prudence, in duplicate, this sixteenth day of February, in the year one thousand eight hundred and thirty.

STEPHEN GIRARD. (SEAL)

Signed, sealed, published, and declared by the said Stephen Girard, as and for his last will and testament, in the presence of us, who have at his request hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, February 16, 1830.

JOHN H. IRWIN,
SAML. ARTHUR,
S. H. CARPENTER.

Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated the sixteenth day of February eighteen hundred and thirty, have, since the execution thereof, purchased several parcels and pieces of

real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my wish and intention to pass by the said will, now I do hereby republish the foregoing last will and testament dated February 16, 1830, and do confirm the same in all particulars: In witness, I the said Stephen Girard set my hand and seal hereunto the twenty-fifth day of December eighteen hundred and thirty.

STEPHEN GIRARD. (SEAL)

Signed sealed and published and declared by the said Stephen Girard as and for a re-publication of his last will and testament in the presence of us, who at his request have hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, Decr 25, 1830.

JOHN H. IRWIN,
SAML. ARTHUR,
JNO. THOMSON.

CODICIL

Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16, 1830, have, since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker the mansion house, out-buildings, and forty-five acres and some perches of land, called Peel-Hall, on the Ridge Road in Penn Township, now I declare it to be my intention and I direct that the Orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High

and Chestnut and Eleventh and Twelfth streets in the city of Philadelphia, shall be built upon the estate so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose exclusively in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said Orphan Establishment prescribed by my said will as to said square shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose—consequently the said square of ground is to constitute and I declare it to be a part of the residue and remainder of my real and personal estate and given and devised for the same uses and purposes as are declared in section XX. of my will, it being my intention that the said square of ground shall be built upon and improved in such a manner as to secure a safe and permanent income for the purposes stated in said XXth section: In witness whereof I, the said Stephen Girard set my hand and seal hereunto the twentieth day of June eighteen hundred and thirty-one.

STEPHEN GIRARD. (SEAL)

Signed sealed published and declared by the said Stephen Girard as and for a re-publication of his last will and testament and a further direction in relation to the real estate therein mentioned, in the presence of us who at his request have hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, June 20, 1831.

S. H. CARPENTER.
L. BARDIN,
SAML. ARTHUR,

Philadelphia, December 31, 1831. Then personally appeared Saml. Arthur and S. H. Carpenter two of the Witnesses to the foregoing Will and the second Codicil or republication thereof and on their Oaths did say that they were present and did see and hear Stephen Girard the

Testator in the said Will and second republication thereof, named, sign seal publish and declare the same as & for his last Will and Testament and republication thereof and that at the doing thereof he was of sound mind memory and understanding to the best of their knowledge and belief—And at the same time appeared Jno. Thomson, one of the Witnesses to the first republication of said will, and on his solemn affirmation did say that he was present, and did see and hear Stephen Girard the Testator in the first republication of said Will named sign seal publish and declare the same as and for a republication of his last Will and Testament and the said Samuel Arthur, another of the witnesses to said republication of said will on his oath did further say that he was present and did see and hear Stephen Girard the Testator in the first republication of said Will named sign seal publish and declare the same as and for a republication of his last Will and Testament, and they both did say that at the doing thereof he was of sound mind, memory and understanding, to the best of their knowledge and belief.

CORAM,
J. HUMES,
Register.

December 31, 1831. Timothy Paxson and Thomas P. Cope, two of the Executors, affirmed—and Joseph Roberts, William J. Duane, and John A. Barclay the other Executors sworn and Letters Testamentary were granted unto them.

APPENDIX B.

Pennsylvania Act of March 11, 1789, 2 Smith Laws 462, § 2, 53 Purdon's Stat. § 6362.

Be it therefore enacted, and it is hereby enacted by the Representatives of the Freemen of the Commonwealth of Pennsylvania, in General Assembly met, and by the authority of the same, That the inhabitants of the city of Philadelphia, as the same extends and is laid out between the rivers Delaware and Schuylkill, be, and they, and their successors for ever, are hereby constituted a corporation and body politic, in fact and in law, by the name and style of "The Mayor, Aldermen and Citizens of Philadelphia", and by the same name shall have perpetual succession; and they and their successors shall, at all times forever, be able and capable in law to have, purchase, take, receive, possess and enjoy lands, tenements and hereditaments, liberties, franchises and jurisdictions, goods, chattels and effects to them and their successors forever, or for any other or less estate; and the same lands, tenements and hereditaments, goods, chattels and effects, to grant, bargain, sell, alien and convey, mortgage, pledge, charge and encumber, or demise and dispose of, at their will and pleasure.

APPENDIX C.

Pennsylvania Act of March 24, 1832, P. L. 176 (1831-1832 Volume), 53 Purdon's Stat. § 7411, § 7433, § 6791.

AN ACT

To enable the Mayor, Aldermen, and citizens of Philadelphia to carry into effect certain improvements, and execute certain trusts.

WHEREAS, By the last will and testament of Stephen Girard, late of the city of Philadelphia, deceased, the sum of five hundred thousand dollars is bequeathed to the mayor, aldermen, and citizens of Philadelphia, in trust among other things, to apply the income thereof "first, to lay out, regulate, curb, light and pave a passage or street on the east part of the city of Philadelphia, fronting the river Delaware, not less than twenty-one feet wide, and to be called Delaware Avenue, extending from South or Cedar Street, all along the east part of Water street squares, and the west side of the logs which form the heads of the docks, or thereabouts; and to this intent, to obtain such acts of assembly, and to make such purchases or agreements as will enable the mayor, aldermen, and citizens of Philadelphia to remove or pull down all the buildings, fences, and obstructions which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue, to fill up the heads of such of the docks as may not afford sufficient room for the said street, to compel the owners of wharves to keep them clean, and covered completely with gravel or other hard materials, and to be so levelled that water will not remain thereon, after a shower of rain, to completely clean, and keep clean, all the docks within the limits of the city, fronting on the Delaware; and to pull down all platforms carried out from the east part of the city, over the river Delaware, on piles or

pillars." "Second, To pull down and remove all wooden buildings, as well as those made of wood and other combustible materials as those called brick-paned, or framed buildings, filled in with bricks, that are erected within the limits of the city of Philadelphia; and also to prohibit the erection of any such building within the said city's limits at any future time." "Third, to widen, pave, and curb Water street, and to distribute the Schuylkill water therein, upon" a certain plan therein set forth. Now, for the purpose of enabling the mayor, aldermen, and citizens of Philadelphia aforesaid, to effect the improvements contemplated by the said testator, and to execute in all other respects the trusts created by his will, to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws.

SECT. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That it shall and may be lawful for the mayor, aldermen and citizens of Philadelphia, by ordinance lawfully enacted, or the intervention and act of authorized officers or agents, to lay out, regulate, curb, light, and pave a passage or street, not less than twenty-one feet in width, on the east part of the city of Philadelphia, fronting the river Delaware, at such distance or distances in the several parts thereof from the eastern line of Water street as they shall judge proper, extending from Vine to Cedar street, to be called the Delaware Avenue; and that, having laid out such street, they shall cause a record of the same to be made in the court of Quarter Sessions for the county of Philadelphia.

SECT. 2. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, in manner aforesaid,

to lay out Water street, in the said city, anew, in such manner as that the same shall be as nearly straight as conveniently may be, and of a uniform, or as near as may be uniform width throughout, not less than thirty-nine feet, if practicable, and the same to open and keep open for ever, as a common and public highway; and that having laid out said Water street of such increased width, they shall cause a record of the same to be made in the court of Quarter Sessions for the county of Philadelphia.

Sect. 3. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to pass ordinances, or take other measures for regulating, adjusting, and determining the easternmost line to which wharves may thereafter lawfully be constructed on the river Delaware, fronting said city, and to cause a record of such regulated line to be made in the court of Quarter Sessions for the county of Philadelphia; to fix and decide on, or cause their officers to fix and decide on the levels of all wharves fronting the said city, and to declare the regulation thereof; to require the owners thereof to pave the same or to lay them with gravel, according to such regulation, so as effectually to drain and pass off the water from the same, and to require all persons owning and occupying or using docks or wharves, to cleanse the same and to keep the same in repair, and to prescribe the form, materials, and character of workmanship of all wharves hereafter to be constructed, and to require all platforms now projecting into the river Delaware, and supported on piles, pillars or piers, to be removed, and to prohibit the construction, in future, of any such projecting platforms; and to require the removal, and prohibit the construction, in future, of all buildings, fences, and other obstructions, to the eastward of Delaware Avenue, above mentioned, and to declare all erections and constructions whatsoever, contrary to the said ordinances, whether erected before or after the passage of the same to

be nuisances, and generally to devise, ordain and execute whatever other things shall by them, the said mayor, aldermen, and citizens of Philadelphia aforesaid, be deemed necessary or convenient for the good arrangement, security and government of the said wharves: *Provided,* That the easternmost line of the said wharves shall not be held to be finally determined, and the record thereof shall not be made, as aforesaid, unless the board of wardens, of the port of Philadelphia, shall decide and make their certificate in writing, that such easternmost line is not inconsistent with the public interests, which certificate shall also be recorded in the said court of Quarter Sessions; but if the said certificate shall not be granted by them, within three months after application made therefor, the refusal or omission of the said board of wardens to grant such certificate, shall, when duly verified by affidavit, be esteemed the judgment and decision of the said board of wardens, that such easternmost line is inconsistent with the public interests, and in case such a decision shall in any wise be made, an appeal shall lie therefrom to the said court of Quarter Sessions, as in other cases, and the judgment of the said court, in favor of such regulated line, shall be, for all purposes, equivalent to a similar decision by the said board of wardens: *Provided* That nothing herein contained shall be construed to give authority to any one to erect wharves, or piers, extending out as far as the said regulated easternmost line, without license from the said board of wardens, as heretofore.

SECT. 4. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to pass ordinances, prohibiting the construction within the said city, or any parts thereof, of all framed or brick-paned or other buildings, the walls whereof are not wholly composed of incombustible materials, determining the thicknesses of which walls of buildings of different dimensions and character

shall hereafter be made in the said city, and in making all such other legal provisions as they shall think expedient for preventing the extension of injuries from fire, in the said city, and to declare all buildings, the walls whereof are not wholly composed of incombustible materials, to be nuisances.

SECT. 5. *And be it further enacted by the authority aforesaid,* That when any of the said ordinances shall have been passed, or other proceedings had in relation to the said Delaware Avenue and Water street, or either of them, and the record thereof shall have been made as aforesaid, it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to proceed, from time to time, to open for public use, any part or parts thereof, and the same to keep open as common and public highways forever; and to that end, to enter upon such property as may be found to be within the same, construct wharves extending into the river, within the lines of said Delaware Avenue, and to a reasonable distance beyond the same, and fill up all docks within the limits thereof, and remove all obstructions, of whatever kind, from within the limits of said avenue and street, or any parts thereof, and level, drain, pitch, and pave the same, as other streets in the said city. And from and after the passing of such ordinances, and the record of the said avenue and street, all buildings, thereafter erected or rebuilt on the said avenue and street shall conform to the recorded limits of the same, and the mayor, aldermen and citizens of Philadelphia aforesaid, may pass ordinances, declaring all obstructions within the same to be nuisances.

SECT. 6. *And be it further enacted by the authority aforesaid,* That it shall at all times be lawful for the mayor, aldermen and citizens of Philadelphia, aforesaid, to remove and abate any building, erection or obstruction whatever, which, by this act, or by any ordinance to be

hereafter passed by virtue of it, may be declared a nuisance: *Provided,* That if such building, erection or obstruction shall have been in existence at the time of the passage of this act, or of such ordinance passed by virtue hereof, the mayor, aldermen and citizens aforesaid shall give at least three months notice of their intention to remove the same to the persons having the ownership, occupation or use thereof, or in case no such persons shall be known to them, then they shall affix a copy of such notice to and upon such building, erection or obstruction, three months before proceeding to remove the same.

Sect. 7. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the said the mayor, alderman and citizens of Philadelphia, aforesaid, to provide for the punishment of any person or persons who shall commit any nuisance contrary to the intent and meaning of this act, and of the ordinances which may be passed by virtue thereof, and of any person or persons who having committed any such nuisance, shall, after notice, refuse or neglect to remove the same.

Sect. 8. *And be it further enacted by the authority aforesaid,* That all persons whatsoever who shall receive damage to their property by reason of any thing which shall have been done by the mayor, aldermen and citizens of Philadelphia, under this act, or any ordinances passed by virtue hereof, may, after ten days notice of such their intention, to the mayor, aldermen and citizens aforesaid, apply by petition in writing, to the court of Quarter Sessions for the county of Philadelphia, who shall thereupon appoint a jury of twelve disinterested freeholders, citizens of the city of Philadelphia, which jury shall assemble, after ten days notice of their meeting, given as aforesaid, and shall be sworn or affirmed to inquire what damages the petitioners, or any of them, have sustained by reason of any thing so done, considering as well the advantages which

may accrue to such petitioners as the injuries by them complained of, and the said jury having viewed the premises and heard the parties, or their counsel, shall report in writing, under the hands of at least ten jurors, and their report having been considered and confirmed by the court, the damages thereby found shall be paid by the mayor, aldermen and citizens aforesaid, in six months after the confirmation of the said report.

SECT. 9. *And be it further enacted by the authority aforesaid*, That if the mayor, aldermen, and citizens aforesaid, shall deem it expedient that the damages should be legally ascertained before proceeding to enter on premises for the purpose of removing obstructions, and before appropriating to public use any property of individuals, or otherwise injuriously affecting the rights and interests of any proprietor, the mayor, aldermen and citizens aforesaid may, from time to time apply to the court of Quarter Sessions for the county of Philadelphia, by petition, in writing, specifying therein as nearly as may be the persons and property in regard to which they desire that the damages should be ascertained, and thereupon the said court shall appoint a jury of twelve disinterested freeholders, citizens of the city of Philadelphia, which jury shall assemble, after ten days notice of their meeting given to the owners or occupiers of the property, and shall be sworn or affirmed, as is provided in the foregoing section of this act, and having viewed and heard, as is therein provided, shall report in writing, under the hands of at least ten jurors, specifying in their said report as well the causes for which damages, if any should be paid, as the amounts of such damages, and in such case the mayor, aldermen and citizens aforesaid may, within the year after the confirmation of such report by the court of Quarter Sessions, tender to any owner of property named therein, the amount of damages thereby found in his favor, or may pay the same into court, for his use and benefit, and may thereafter proceed to enter upon

the premises, and remove the obstructions, or appropriate the property for which damages shall have been so paid or tendered, first giving three months notice to the tenant in possession, if any: *Provided however,* That if the amount so found by such jury in favor of any owner, shall not be so tendered or paid within one year after the confirmation of such report, then the proceedings had upon the said petition of the mayor, aldermen, and citizens aforesaid, shall, so far as relates to the said owner, be null and void, and the mayor, alderman, and citizens aforesaid, may thereafter present their petition in writing anew, under this section, as if no proceedings had before been had: *And provided also,* That when a report shall have been made by a jury, under the provisions of this section, and damages shall have been tendered or paid, in accordance therewith, if thereafter any damage than that reported on shall be sustained, the party aggrieved may thereafter apply, in regard to such other damages, for a jury to assess the same, under the eighth section of this act: *Provided further,* That it shall at all times be competent to the mayor, aldermen, and citizens aforesaid, to agree with any owner or owners of property, so to be taken, removed, or affected for the damages thereby to be occasioned, and such agreement shall be instead of any of the proceedings detailed in this or the foregoing sections of this act: And, forasmuch as in the course of time it may appear that powers are not vested in the said the mayor, aldermen, and citizens of Philadelphia which may be yet required to the full execution of those parts of the said will of the said Stephen Girard, for the carrying of which into effect he has in his said will requested legislative provision, and it is the object and intent of this act fully to confer all such powers.

SECT. 10. *Be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and do and execute all such

acts and things whatsoever as may be necessary and convenient for the full and entire acceptance, execution and prosecution of any and all the devises and bequests, trusts and provisions contained in the said will, which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephan Girard has desired the legislature to enact the necessary laws.

SECT. 11. *And be it further enacted by the authority aforesaid,* That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the Trustees or Directors of said college, and approved of by a majority of the select and common councils of the city of Philadelphia.

IN THE

Supreme Court of the United States

October Term, 1956.

No. 768.

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST AND ROBERT FELDER,

Appellants,

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA,

Appellee.

PETITION FOR REHEARING.

JOSEPH P. GAFFNEY, SR.,
Solicitor for Board of Directors of City Trusts,
OWEN B. RHOADS,
Associate Counsel,
Attorneys for Appellee.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 769.

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST AND ROBERT FELDER,

Appellants,

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA

Appellee.

PETITION FOR REHEARING.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Appellee, the Board of Directors of City Trusts of the City of Philadelphia, respectfully requests this Honorable Court to reconsider its *per curiam* decision rendered April 29, 1957, and either (1) to vacate so much of the *per curiam* order as granted appellants' petition for certiorari and reversed the judgment below, and to dismiss the petition for certiorari as improvidently granted, or (2) in the

alternative to vacate so much of the order as reversed the judgment below and place the case on the calendar for briefs and oral argument on the merits.

This Petition for Rehearing is filed for the following reasons:

(1) On a petition, and brief in opposition, devoted solely to whether the Court should review a judgment of the Supreme Court of Pennsylvania, this Court took jurisdiction *on the merits* of the cause and, without according the holder of that judgment the opportunity to present its case, summarily reversed the Supreme Court of Pennsylvania. In view of the importance of the issues involved, and of the admitted fact that prior to this case there has never been a decision on a similar set of facts, the case should not have been decided on the basis of briefs directed only to jurisdictional questions.

(2) The writ was improvidently granted. The Court's *per curiam* reversal of the judgment below is a holding that the trustee's compliance with the terms of the will of Stephen Girard was "discrimination by the state." This holding is not in accord with the prior decisions of this Court distinguishing state action from individual action. Appellee believes that because the parties were not heard on the merits, the Court, having been misled by Appellants' Jurisdictional Statement, misunderstood the nature of the trust and erroneously concluded that the City of Philadelphia had some function to perform in choosing the beneficiaries.

(3) It is apparent from the portion of this Court's opinion which stated that the Board which operates Girard College is an agency of the State of Pennsylvania for Fourteenth Amendment purposes that the Court misunderstood the organization of and functions performed by the Board.

STATEMENT OF THE CASE ON REHEARING.

By the Act of March 11, 1789, 2 Smith's Law, page 462 (53 P. S. § 6362 et seq.), a perpetual charter was given to the City of Philadelphia. By virtue of that charter the City of Philadelphia remains a corporation to this day (53 P. S. Historical Note, page 557). It was entitled "An Act to incorporate the City of Philadelphia." Section 2 (53 P. S. § 6362) provided, inter alia, "The inhabitants of the City of Philadelphia, as the same extends and is laid out between the rivers Delaware and Schuylkill, *be, and they, and their successors for ever, are hereby constituted a corporation* and *body politic, in fact and in law,* by the name and style of 'The Mayor, Aldermen and Citizens of Philadelphia', and by the same name shall have perpetual succession." (Emphasis supplied.) The Act of February 2, 1854, P. L. 21 (53 P. S. § 6361), changed the name of the corporation to "The City of Philadelphia", and increased its boundaries.

Stephen Girard died in 1831. He left the largest portion of his estate, in trust, to erect and maintain a "college" to care for "poor white male orphans" between the ages of six and ten years. By his Will he also provided that all the bequests and devises of his residuary estate were made upon the expressed condition that none of the monies, principal, interest, dividends or rents arising from the said residuary devise and bequest, "shall at any time be applied to any other purpose or purposes whatever than those therein mentioned and appointed." As further assurance that the funds would be applied only in accordance with his Will he included a clause forfeiting most of his estate to the United States should the estate be used by the City and Commonwealth for purposes other than those he specified.

Having created a perpetual trust it became necessary for Girard to name a perpetual trustee to administer it. In 1830 and 1831 there were no corporations which enjoyed

perpetual existence capable of administration of such a trust, other than the said "The Mayor, Aldermen and Citizens of Philadelphia", wherefore the selection of this "corporation and body politic" as trustee was essential.

The Board of Directors of City Trusts [created by the Act of June 30, 1869, P. L. 1276 (53 P. S. §§ 6481-6486), a further supplement to an act to incorporate the City of Philadelphia] took over the administration of the trust in 1870. Since that time the Board has exercised all the duties, rights and powers given by Girard's will except only the function of holding title to trust property.

As a "corporation and body politic" under the creating Act of March 11, 1789, supra, there can be no doubt that the City of Philadelphia acts in, or possesses, a triple capacity or triple character, exercising correspondingly three-fold functions, powers, rights and duties, which, although variously designated, may be classed as public or governmental; private, proprietary or municipal; and, finally, fiduciary.

Since 1739, when certain ground rents were devised by William Carter to the City of Philadelphia, as trustee for the use of the alms house and the relief of the poor until the present time, as trustee of some ninety charitable uses and trusts, including the Estates of Stephen Girard and Benjamin Franklin, the City of Philadelphia has acted in its fiduciary capacity and not in its sovereign, public or governmental capacity. For almost a century there has been a complete severance of the governmental and proprietary functions on the one hand from the fiduciary function on the other. The Board exercises no governmental powers, and the government of the City has no power over it. In short, the Board (fourteen community leaders from the Philadelphia area who serve without pay) is a trustee with power and authority no different from that of an individual or corporate trustee. As was said in the instant case (386 Pa. 548 at page 584):

"Perhaps equally important, Girard College was never administered by the City in its governmental or sovereign capacity. It was administered originally by the Mayor, Aldermen and Councils, and subsequently by an independent agency created by the Legislature *solely in the capacity of a fiduciary or trustee, governed, bound and limited by the directions and provisions of Girard's Will.*"

For 111 years the trustee has administered the trust in conformity with Girard's Will. Not once has it deviated from the terms of the Will, except when the investment restrictions imposed by Girard could not be carried out without rendering it impossible to continue the college. On each occasion when the Board has found it impossible to comply with a provision in the Will, it has requested instructions from the Orphans' Court of Philadelphia County. Each time that Court has based its judgment on an examination of the Will and a determination of Girard's intention. Never before this has the Board, the City, the Commonwealth or any court assumed or asserted the power to decide any question relating to the administration of Girard College except by reference to Girard's Will.

It was for this reason that the Board merely complied with the Will when it appeared that Foust and Felder were not within the class of beneficiaries chosen by Girard. Since in the last analysis the rights of the applicants, Foust and Felder, to share in the Trust proceeds depends upon the Will, it was to the question of the validity of the terms of the Will that the Pennsylvania courts turned their principal attention. They upheld the Will. This Court reversed *per curiam* upon a collateral Constitutional question concerning which this Court did not accept briefs or hear argument.

I.

In View of the Importance of the Issues Involved, This Case Should Not Have Been Reversed Without a Full Hearing on the Merits.

Since the *Civil Rights Cases,* 109 U. S. 3 (1883), this Court has been faced time and again with the problem of determining how far the right of an individual to be free of social restraints imposed by virtue of his race or color may be protected against the right of other individuals to express their own predilections. Intricately bound up in these cases are the first principles of government and the social order. The fundamental principle that every individual has certain basic rights that society must respect is a limitation on and frequently conflicts with the equally fundamental principle that, in a democratic society the majority shall rule. Accordingly, cases involving the Fourteenth Amendment, which has become the source of most of these rights, deal with matters of the most vital importance because of the inherent restrictions upon the very purposes of government.

Traditionally, most Fourteenth Amendment cases have involved only a conflict between an asserted individual right and the power of society, as an organization, to interfere with it. Rights of other individuals have rarely been involved. The obvious reason for this is that the Fourteenth Amendment has been interpreted to restrict only the action of the state. This has made it unnecessary to answer the host of questions which must arise if that Amendment were interpreted to apply to individual action. By now it is easy enough to say that the state cannot interfere with a person's basic rights. Since the state is an impersonal body, no one ordinarily becomes overly concerned that any "rights" which the state itself has may be restricted by such decisions.

Where the state is not alone involved, however, it is a very different matter. At that point protection of one man's freedom from restraint must be weighed against another man's freedom to act. Such cases do not merely involve the right of the one to be free of restraint by the state, but the right of the other to act, and to be protected in his acts by the state.

In *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955), where this Court held *two* full hearings on the issues and concluded by dismissing certiorari and vacating its first opinion, Mr. Justice Frankfurter, speaking for the Court, candidly and briefly stated at p. 72:

> "Only if a State *deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment* can its protection be invoked. Such a claim involves the threshold problem whether, in the circumstances of this case, what Iowa, through its courts, did amounted to 'state action'. *This is a complicated problem which for long has divided opinion in this Court* . . . Were this hurdle cleared, the ultimate substantive question, whether in the circumstances of this case the action complained of was condemned by the Fourteenth Amendment, *would in turn present no easy constitutional problem.*" (Emphasis supplied.)

Once again such a case is before this Court.

Even if it clearly involved state action only, it is nevertheless in a field which demands the most careful attention. But the state is not alone involved. Appellants have asserted the right to be free of racial discrimination *practiced by the state*. Appellee asserts that *no such discrimination* exists here and stresses the right of an individual to dispose of his property at his death as he wishes. Against the right asserted by appellants, appellee has earnestly advanced the right to endow a private institution benefiting a limited number of people, the right

to make a will, and the right to create a trust and have it carried out in accordance with its terms. The collision between the rights asserted raises questions which have never been decided before. They are of the utmost importance, not only to those directly interested in Stephen Girard and his "college", but also to all persons who believe that the rights appellee asserts are worthy of the same protection afforded to appellants' rights.

Appellee submits that, where a case is both novel and involves fundamental constitutional rights, fairness should dictate the fullest possible hearing and the most careful consideration of *all* the rights involved. Appellee's brief filed with this Court considered jurisdictional questions only. It was not supposed to, and did not, deal with the merits of the federal questions involved, other than to set forth in the briefest possible summary of three pages why, in appellee's opinion, the federal question had been correctly decided below. Appellee has in effect been silenced before it could utter a word or submit an argument in defense of the conclusion reached by the judges of the Supreme Court of Pennsylvania and of one of the Commonwealth's finest lower courts.

In contrast, the decisions of the Pennsylvania courts were based on the most extended oral and written arguments. There were two full hearings in the Orphans' Court, one before the auditing judge and one before the six Orphans' Court judges sitting en banc. Although expressing serious doubts as to the standing of some of the appellants even to be heard (Record, 181a), that court heard oral argument and received briefs of each appellant. The Supreme Court of Pennsylvania allowed appellee to file two briefs and not only received briefs from the appellants but also accepted a brief from an amicus curiae, the Philadelphia Fellowship Commission, which sided with appellants. It is significant that only one of the twelve state court judges came to the same conclusion as this Court. This, at the very least, shows beyond question what was apparent from the

beginning of this case—that reasonable men, men of the highest repute, can honestly differ on questions involving fundamental rights, and that this case was not so easy to decide that it warranted *per curiam* reversal without allowing appellee to be heard.

The state courts decided the matter only after all sides of the question had been presented in full. This Court has reversed the judgment of the highest court of Pennsylvania, without permitting it to be defended, on issues which, it is submitted, are of the utmost significance. Appellee cannot find a single precedent for such a result. The action of this Court is contrary to the views stated in the *Rice* case, *supra*, on the importance of these questions. Appellee believes that in the history of this Court it is the first party to have had its case reversed without a hearing on the basis of a new approach to fundamental constitutional law.

The *per curiam* opinion of this Court states that the Board operates Girard College; that the Board is a state agency; and that, therefore, the case is covered by *Brown v. Board of Education of Topeka*, 347 U. S. 483 (1954). It appears from these six lines that this Court treated this case as simply another segregation case, which it is not.

None of the school segregation cases involved private property. The only cases involving both racial distinction and private property that appellee has found are *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Barrows v. Jackson*, 346 U. S. 249 (1953); and *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955). While private property was involved in each of those cases, none of them is even remotely similar to this case.

Nor did the school segregation cases, or any other Fourteenth Amendment case of any description, involve a public body acting only in a fiduciary capacity. In this respect, if in no other, this case is unlike any before it. In the extensive arguments made to the Pennsylvania courts, none of the parties were able to cite a single authority directly to the point. Appellee cannot believe that the

fiduciary element is so insignificant as not even to merit a hearing. The fact that a public body is connected with private property solely by way of administration of a trust raises a host of questions that cannot be disposed of simply by a reference to *Brown v. Board of Education of Topeka, supra.*

Is a trustee who does what his decedent directs him to do no different from a public body which does what the state commands? If identity is found in these two situations merely from the fact that a public body appears in both cases, is not substance being ignored and form exalted? Is it consistent with our fundamental legal precepts to permit a public body, which has solemnly accepted private property and agreed to administer it in accordance with the owner's wishes, to appropriate that property to its own uses? The answers to these and other questions may vary, but the questions persist.

It may be easy to understand that, where state or local governments provide facilities, whether they be for education, recreation or other services, out of taxes paid, either directly or indirectly, by all of the races, white, black, red, brown or yellow, that they and their children should participate in and enjoy all the benefits which flow therefrom on equal terms. But such is not the Girard case. Girard College is not in any sense a public school. It was not built nor has it ever been maintained by any state or local funds, whether from the money of taxpayers of all races or otherwise. It is what Girard called it in the codicil to his Will, dated June 18, 1831, an "orphan establishment". The beneficiaries of Girard's bounty down through the years have not been determined, nor are they now determined by the Commonwealth of Pennsylvania nor by the City of Philadelphia nor by any court, local or supreme, but solely by Girard himself in the exercise of his undoubted right to dispose of his own property by will, and in so doing, to say who shall enjoy its benefits. That is now and always has been the law of Pennsylvania.

Is this Court proclaiming that it is not the law of the United States? Until this Court's *per curiam* opinion lawyers believed that the due process clause of the Fourteenth Amendment was a solemn constitutional guarantee that governmental bodies—organizations which of necessity are swayed by the political temper of the times—could not change to suit the purposes of the State the disposition an individual made of his own property. Until this Court's *per curiam* opinion there was just as strong a belief that if the State created an agency to administer charities, as Pennsylvania created the Board of City Trusts, the agency was bound by the Constitution to administer all trusts in accordance with their terms and not to change their terms better to suit the State. If the agency deviated from that policy of consistency, if it administered eighty-nine trusts in accordance with their terms but refused to follow the directions in one such as Girard's, then the State would have denied to Girard the equal protection of the laws. Should these fundamental concepts so important to free men in a free society have been wiped out by the highest court in the land without so much as a hearing upon their application?

In support of its *per curiam* decision this court cited *Brown v. Board of Education of Topeka, supra.* That was the case involving those state laws which required segregation in public schools. The decision, which held such laws unconstitutional in that they were discriminatory and therefore denied equal protection to all persons, does not support the court's decision here. In principle the *Brown* case requires the opposite result from the one the court reached in this case. Here the City of Philadelphia and the State of Pennsylvania are attempting to "discriminate" against the privately endowed orphanage of Stephen Girard because it is not run in accordance with the policy of integration adopted by Pennsylvania. Because Stephen Girard is by the present-day standards of those holding office in Philadelphia and Pennsylvania a non-comformist, the

City and State would deny to him the right to have his will enforced, a right which other persons in this State are allowed to enjoy. We respectfully submit that the spirit of the *Brown* case should have led this court to the conclusion that those in political power in this country may not govern with inequality, i.e., may not "discriminate", simply because such inequality of treatment serves the end they would like to attain.[1]

It cannot be said of the petitioners in the Girard case, as it was of the children in the *Brown* case, that failure to admit them will have a tendency to retard their educational and mental development or deprive them of an education. The public school system is open to them on exactly the same basis as it is to all other children of Philadelphia. They will not be sent to segregated schools or forced to accept facilities allegedly "separate but equal." They will be at one with the vast majority of Philadelphia children who for one reason or another cannot enter Girard College.

The instant case can be still further differentiated from *Brown v. Board of Education of Topeka, supra.* In that case the admission of negroes to public schools could not deprive white children of an education. But in this case,

1. Stephen Girard exercised unusual foresight. He visualized the possibility that the political heads of the City and State might at some time be tempted to use the large resources of his estate for their purposes and not for the purposes Girard specified. He therefore provided for forfeiture of most of his estate to the United States should that contingency occur (Clause XXIV, paragraph 3). Such forfeiture clauses are valid and binding. *Charlotte Park and Recreation Commission v. Barringer,* 242 N. C. 311, 88 S. E. 2d 114, *cert. denied,* 350 U. S. 983 (1956). The auditing judge in this case has already stated that if the case were returned to him he would have to decide the applicability of that clause, a problem which was moot in view of his decision upon the constitutional question. *Girard Estate,* 4 D. & C. 2d 671, 701-702 (1955). Thus, in their attempts to force the application of their ideas of what is right and wrong for Girard College upon the trustee, the City and State may have in effect destroyed the institution. Again we most respectfully ask, does justice require that a party be denied the opportunity to argue its case when the decision against it raises even the possibility of such a catastrophy?

if the courts of Pennsylvania were to admit the petitioners, they would displace boys who fully qualify under the Will and who would thereby be denied the right to attend the orphanage. It is an accepted fact that there is no lack of beneficiaries who meet all the qualifications of the testator's Will. Thus, the "poor white male orphans" who might lose their right to attend have standing to enforce the trust. *Wiegand v. The Barnes Foundation*, 374 Pa. 149 (1953). *Restatement of the Law of Trusts*, Sec. 391.

In addition to private property and fiduciary powers, this case, as has been shown above, involves a will. In this respect, too, the case has no precedent. Girard College is not a part of the school system. It was created by a will and it is still operated in accordance with the terms of that Will. It may be difficult to believe that, after the lapse of over 100 years, the orphanage really is administered in accordance with the terms, including the peculiar terms, of a Will written in President Jackson's administration. Girard banned priests and ministers from the college grounds at a time when Deism was popular enough to be accorded respect. Religious thinking has changed in the century since that time, but priests and ministers, even those who are graduates of the orphanage itself, are still not permitted to set foot on the grounds. This may appear extraordinary. It is perhaps incredible that the living should respect the wishes of the dead with such devotion. Girard College has been administered in this manner because those closest to it, its students and alumni, believe that they owe their education to Stephen Girard and insist that his wishes be respected. These students and alumni do not understand how a momentous change in Girard's Will and in the operation of the college can be effected without a hearing. Nor can others, to whom a respect for wills is meaningful, see the similarity between the segregated public schools of the *Brown* case and an institution created by the will of a single individual for the benefit of certain persons only.

Finally, the case involves a charitable trust. It deserves a hearing on the question of how the expanding scope of the Fourteenth Amendment affects the right of a man to bestow his wealth upon selected groups. Charitable trusts were once invalid as against public policy, albeit that policy had no similarity whatever to the public policy which this Court is now enforcing. Undoubtedly, the decisions holding charitable trusts valid, and determining that charities could exist for the benefit of selected classes of persons, were the products of liberal thinking. If this thinking is now in the process of running full circle, it is a vitally important matter that merits the fullest consideration by this Court. In its Motion to Dismiss appellee urged a distinction between discrimination and selectivity. It is submitted that a hearing should be granted on the question whether, other factors being equal, the necessary selection made by one who endows or aids a charity, is discrimination and subject to the prohibitions of the Fourteenth Amendment. Appellee urges that this, too, is a new and important question which should not be summarily answered without permitting both sides to be heard.

This case is not a public school segregation case and it cannot in any conceivable way affect the law of such cases. The several important questions raised affect the law of wills, the law of trusts, and the law of charities. They affect one of the largest private charitable trusts in the United States. They affect ninety other charitable trusts administered by this trustee, and an untold number throughout the country. Appellee respectfully submits that it should be granted its day in this Court and the opportunity to present its case.

II.

This Court's Decision That the Board's Administration of the Girard Estate Violates the Fourteenth Amendment Is in Error, and the Petition for Certiorari Should Be Dismissed.

The summary determination of this Court that the City of Philadelphia could not administer the trusts created by the Will of Stephen Girard, deceased, as drafted by the testator overruled two of its prior decisions as well as many by the courts of Pennsylvania. This Court upheld the Will and affirmed the power of the City of Philadelphia to administer the trusts in *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia*, 43 U. S. (2 How.) 127 (1844), and *Girard v. Philadelphia*, 74 U. S. (7 Wall.) 1 (1868). To the same effect are the decisions of the Supreme Court of Pennsylvania, *City of Philadelphia v. Girard Heirs*, 45 Pa. 9 (1863); *Philadelphia v. Fox*, 64 Pa. 169 (1870); *Wilson v. Board of Directors of City Trusts*, 324 Pa. 545 (1936). A similar will was upheld in *Perin v. Carey*, 65 U. S. (24 How.) 465 (1860). The overruling of the earlier consistent line of cases involving this very estate was accomplished without even hearing from the parties on the merits of the questions presented.

But aside from these precedents, the determination that the Board of City Trusts violates the Fourteenth Amendment by its administration of the trusts set up by the Will of Stephen Girard, deceased, is entirely contrary to this Court's other decisions in the field. In *Shelley v. Kraemer*, 334 U. S. 1 (1948), Mr. Chief Justice Vinson succinctly set forth the purpose of that amendment at p. 23:

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of

basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."

Before the Fourteenth Amendment can be invoked, it is necessary to show the existence of a right independent of the Amendment and its violation by an act of the state. *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955); *Twining v. New Jersey*, 211 U. S. 78 (1908); *United States v. Cruikshank*, 92 U. S. 542 (1875). In *Brown v. Board of Education of Topeka, supra*, the right of the plaintiffs to attend public school was admitted. But in this case no effort has been made to establish the right of these applicants to attend Girard College existing independent of the trusteeship.

The legal basis for the admission or non-admission of the present applicants is the Will of Stephen Girard, who had the right under the law of Pennsylvania to leave his property to whom he saw fit. *Johnson Will*, 370 Pa. 125, 87 A. 2d 188 (1952); *Wetzel v. Edwards*, 340 Pa. 121, 16 A. 2d 441 (1940). He did not choose to benefit the petitioners. Of this, they can have no complaint since there was no obligation on Girard's part to include them in his bounty. Therefore the Board, as trustee, is not depriving them of any right when it follows the dictates of the Will.

The instant case differs markedly from all others in which this Court has held a governmental body engaged in state action. This is a case of a municipality's "agent," which has no governmental powers whatever, merely administering a trust. Its powers and duties are not set forth in a constitution or charter or an act of assembly. They were not established by the vote of the people or their representatives. They derive solely from the will of a private individual, Stephen Girard. Furthermore the funds them-

selves are not the fruits of taxation nor outright gift but were devised and bequeathed to the trustee for specific purposes. These objects were fixed by the testator, not by an act of the municipal governments. The Board differs in no wise from other trustees.

In the quoted passage from the *Rice* case above, Mr. Justice Frankfurter noted the searching question of whether, in any given case, "state action" is involved. Appellee believes that this question is important not merely because the Fourteenth Amendment is limited by its terms to state action, but because any broader application involves an interference with individual rights that may be more destructive to some individual liberties than protective of others. In determining what the state cannot do, therefore, it is crucial that private rights not be obliterated. No one seriously controverts this. But like every other case it is necessary to balance the considerations on both sides and to make distinctions which, though only of degree, are nevertheless required by the Fourteenth Amendment.

The position of the Board in the administration of Girard College is that of an agent for a private individual. If, in directing which of millions of needy persons his estate should be used to benefit, Stephen Girard must be branded a discriminator, it is he and not the Board which discriminates. The Board obeys the commands of the Will, not the dictates of the state or any other public body. It deals with private property and administers a private trust. The City has never dealt with the Girard Estate as other than private property. The complete separation of the Board from the City government is a clear demonstration of the special function served by the trustee. It is not the Board which offers education to the limited number of boys that the college can accommodate, just as it is not the Board which denies clerics the right to visit the college. Both are done by the Will of Stephen Girard.

The Board does no more than carry out Girard's Will. It does no more than the Register of Wills of Philadelphia County when he admits a will to probate and grants letters testamentary, or when he appoints an administrator, who is just as clearly an agent of the state, to administer the estate of an intestate. Nor does the Board act differently from the Orphans' Court when it adjudicates the account of a fiduciary appointed in a decedent's will and orders that his estate be distributed in accordance with that will.

All of this is state activity. But is it "state action" which cannot be allowed if the decedent wills his estate to persons described by race, color or creed? Race distinctions are not the only ones prohibited by the Fourteenth Amendment. It is startling for a person devoted to one religion to realize that he may not be able to receive the aid of the state in leaving his property to his own church, and without that aid, his wishes cannot be carried out.

There was a time when the functions of the state in the lives of individuals were so limited that "state action" was relatively easy to define. That is no longer the case. Mr. Justice Bromley, writing for the New York Court of Appeals in *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512 (1949), cert. denied 339 U. S. 981 (1950), noted both the growth of government activities and the limits which must, as a result of that development, be placed on "state action."

> "The evolution of our society has disclosed State action where doubtless it would not have been found in an earlier day. Institutions created to meet the social and industrial necessities of our times do not respond readily to the simple test enunciated in *Ex Parte Virginia* . . . . Those considerations might suggest the desirability of holding that the test can be satisfied, and State Action discerned, in any case where the State has tolerated discrimination respecting a matter of high public importance. Invocation of the Constitution then might depend upon a balance of the two

values asserted—here the privilege of Metropolitan and Stuyvesant as against the right of appellants to equality of treatment.

"Such a development in constitutional law would clash with a fundamental policy inherent in the Fourteenth Amendment and the decision of the *Civil Rights Cases* . . . The unquestioned value of that system suggests the limits to the expanding concept of State action, which has hitherto been found only in cases where the State has consciously exerted its power in aid of discrimination or where private individuals have acted in a governmental capacity so recognized by the State.

"The State of New York has consciously and deliberately refrained from imposing any requirement of nondiscrimination upon respondents as a condition to the granting of aid in the rehabilitation of substandard areas. Furthermore, it has deliberately refrained from declaring by legislation that the opportunity to purchase and lease real property without discrimination is a civil right. To say that the aid accorded respondents is nevertheless subject to these requirements, on the ground that helpful cooperation between the State and the respondents transforms the activities of the latter into State action, comes perilously close to asserting that any State assistance to an organization which discriminates necessarily violates the Fourteenth Amendment. Tax exemption and power of eminent domain are freely given to many organizations which necessarily limit their benefits to a restricted group. It has not yet been held that the recipients are subject to the restraints of the Fourteenth Amendment.

"The increasing and fruitful participation of government, both State and Federal, in the industrial and economic life of the nation—by subsidy and control

analogous to that found in this case—suggests the grave and delicate problem in defining the scope of the constitutional inhibitions which would be posed if we were to characterize the rental policy of respondents as governmental action. To cite only a few examples: the merchant marine, air carriers, and farmers all receive substantial economic aid from our Federal Government and are subject to varying degrees of control in the public interest. Yet it has never been suggested that those and similar groups are subject to the restraints upon governmental action embodied in the Fifth Amendment similar to the restrictions of the Fourteenth upon the States. We do not read the language in *Steele v. Louisville & Nashville R. R. Co.*, . . . as implying such a suggestion. Such restraints as have been imposed upon their freedom of action are derived from statute, common law, and we feel that those sources of control are the most appropriate.

"We are agreed that the moral end advanced by appellants cannot justify the means through which it is sought to be attained. Respondents cannot be held to answer for their policy under the equal protection clauses of either Federal or State Constitution. The aid which the State has afforded to respondents and the control to which they are subject are not sufficient to transmute their conduct into State action under the constitutional provisions here in question." (at pp. 534-36)

Appellee does not believe that "state aid" can become synonymous with "state action" without entirely destroying the right of an individual to live his life as he wishes. There is virtually nothing that an individual does today that does not involve the state in some manner. If a group of people gather together for charitable purposes, it is the state which is their conservator, being the guardian of all charities. It is the state which grants them a charter if they wish to incorporate. The state organizes and controls the

police and fire departments which protect their property, and grants them access to courts to protect their rights. But if the presence of the state in these ways is "state action", this group cannot found a Roman Catholic convent for Catholics only, or give scholarships to Methodist schools only, or organize a society for the care of Indians in a western state, or devote its resources to the betterment of the negro race. Nothing would be more contrary to our social development and to our fundamental principles.

No one has yet suggested that the Fourteenth Amendment or the *Brown* case, which prohibits the state from using its power to discriminate among races, deprives an individual of the right to express his preferences, even though they be racial, or to associate with whom he wishes. This is as much a right of freedom of expression as is the right to speak freely on political issues. The state is the only body that can adequately protect the right of a person to speak as he wishes, whether or not others agree with what he says. In protecting that right the state is not passing upon the merits of what is said. It is merely carrying out, impartially and fairly, its duty to afford to every citizen an equal protection of the right of free expression. The same is true when the state affords equal protection to the fulfillment of a person's last will. *All that the equal protection clause demands, and to a large extent all that the due process clause permits, is that the state say to every person that his will, whatever it may contain, will be honored.* In the case of charities, all the Constitution requires is that every charity be treated equally.

The Commonwealth of Pennsylvania and the City of Philadelphia have accorded to Stephen Girard the right to have his Will carried out. The same protection is given to every other citizen of Pennsylvania. If the Board were prohibited from acting as trustee of trusts for the benefit of colored children, or if the Board were empowered to carry out trusts for the benefit of poor white male orphans only, there would clearly be a discrimination by the state

and an unequal protection of rights. But the Board exists for the benefit of every citizen. It is authorized to, and does, act as trustee for any person who desires the City to be trustee for a charitable purpose, and carries out with equal diligence the terms of every such trust. It is not responsible for and does not pass judgment on the terms of the trusts. It exists and acts as the agent of anyone desiring its services, and there has never been the shadow of a claim that it offers its services in any discriminatory manner whatever.

This is not a situation where individuals are engaged in what is normally done by government, as in *Marsh v. Alabama*, 326 U. S. 501 (1946); *Smith v. Allwright*, 321 U. S. 649 (1944); *Nixon v. Condon*, 286 U. S. 73 (1932). Nor is the City forcing discriminatory conduct on those who do not desire to practice it. *Shelley v. Kraemer*, 334 U. S. 1 (1948). This is not an attempt to bar the petitioners from a municipally owned, tax supported institution either directly as in *Brown v. Board of Education of Topeka*, 347 U. S. 483 (1954); *Kerr v. Enoch Pratt Free Library*, 149 Fed. 2d 212 (4th Cir. 1945), or by subterfuge, as in *Muir v. Louisville Park Theatrical Association*, 347 U. S. 971 (1954). This is a case of a municipality using the funds of an individual for the purposes which he specifically prescribed.

To find "state action" wherever the state participates and regardless of the nature or degree of that participation is to dwell upon and overemphasize a phrase which does not even appear in the constitutional provision which it seeks to define. The Fourteenth Amendment says nothing about "state action", which is simply a shorthand way of drawing a necessary line. This should not obscure the actual language of the Amendment that no state shall "deny" the equal protection of the laws. In providing a trustee, in probating wills and distributing estates, and in protecting charities the state is not denying equality to any person. It provides facilites only, and these facilities are open to all. It takes no part in determining who shall receive the bene-

fits of trusts and wills or the generosity of charities. These are, as they have been, private matters.

Appellee suggests that some line must be drawn between individual action and state action if freedom of individual expression is to survive, and if the equal protection clause is not to eat away at the due process clause by denying the right of free expression. Appellee believes that in accordance with prior decisions it is proper to draw that line where it is the individual, not the state, which is the source of what is being expressed. In such cases, if all the state is doing is furnishing protection to the right of individual expression, and if that protection is equally available to all, the state should not be deemed to be acting contrary to the Fourteenth Amendment. Otherwise the freedoms of expression guaranteed by that same Amendment will be in jeopardy. The Board of Directors of City Trusts believes that it is not engaged in "state action" as that term has been heretofore applied. The writ was improvidently granted. It is respectfully submitted that certiorari should be denied.

III.

There Should Be a Hearing to Consider the Nature of the "Agency" of the Board of City Trusts.

The brief *per curiam* opinion of this Court deals solely with the competency of the Board of City Trusts to act as Stephen Girard's trustee. This Court did not declare any provision of the Will invalid, and it did not say that appellants, Foust and Felder, have a right to attend the orphanage or are to be admitted to it. The order remanded the case for further proceedings, meaning simply that the Pennsylvania courts must take such procedural steps as are necessary to carry out the intent of Stephen Girard in the light of this Court's decision that *this trustee in its present capacity* may not carry out the Will. If these statements in any way indicate a misunderstanding of the

opinion, then assuredly a hearing should be held so that the matter may be clarified.

Thus, while we recognize that the opinion does not make any changes in the substantive provisions of the Will, nevertheless the decision is of such far-reaching significance, not only to this trustee but to others similarly situated, that it calls for the most careful consideration by this Court to determine whether the relationship between the Board of City Trusts and the City of Philadelphia is what this Court, without having heard argument on the matter, assumed it to be. The fact is that the Board of City Trusts while admittedly an "agency of the State of Pennsylvania" is no more, is in fact less, such an "agency" than are many other corporate trustees. It was created by statute just as other corporate trustees are created. It is an "agency" of government in precisely the same way as are other corporations. It has the same powers to administer trust properties as do other trustees, no more and no less. Thus, a decision concerning the capacity of the Board is a decision concerning the capacity of all trustees whose existence stems from the authority of the State, and that means virtually all trustees. We sincerely believe that the Appellants' Jurisdictional Statement led this Court to the erroneous conclusion that the Board is a trustee different from other trustees. We believe that the repeated statement that the courts of Pennsylvania have carved out a new exception to the concept of "state action" under the Fourteenth Amendment may have influenced the Court. We have not been afforded the opportunity of explaining the functions of the Board or of discussing the position the Board occupies under Pennsylvania law, something that is only too familiar to the Pennsylvania judges but which the justices of this Court might well have misunderstood. A hearing on the merits would give the opportunity to clarify this situation.

At this time it is not possible to treat the problem as fully or as carefully as its implications warrant. That

must wait until the opportunity is given to present this case on the merits. One specific example should, however, point up the problem and the very extreme changes which the *per curiam* opinion may have unwittingly brought about. Banks are creatures of legislation. It is fundamental, for instance, that National Banks are "instrumentalities of the Federal Government, created for a public purpose . . ." *Smith v. Witherow,* 102 F. 2d 638, 641 (3rd Cir. 1939). They are, in short, "agencies" of the United States, just as the Board of City Trusts is an "agency" of the City of Philadelphia and hence of the State of Pennsylvania. In fact, the Federal Government has far more power to control the workings of its national banks than has the City of Philadelphia to control the Board of City Trusts. The words "City of Philadelphia" appear in the Board's title, but the governing bodies of the city do not and cannot control the Board in any respect whatsoever. The Board must answer to the Orphans' Court as must other trustees. Since the law applicable to one set of facts governs all similar sets of facts, lawyers representing National and State banks are gravely concerned by the rule of law announced in this Court's recent opinion. On the face of it the ruling that the Board of City Trusts, an "agency of the State of Pennsylvania," is not competent to administer Stephen Girard's trust, is also a ruling that National Banks, "agencies" or "instrumentalities" of the Federal Government, and that State banks, "agencies" or "instrumentalities" of the State, are incompetent to serve under similar circumstances.

If it is a denial of equal protection of the laws for a trustee to refuse to make available to a negro the property in trust for whites, it is just as much a denial of equal protection of the laws for the same trustee to refuse to make available to a methodist property in trust for catholics. If two negro boys have standing to sue in order to claim the facilities of a trust for white boys, then two

methodist boys have standing to sue to claim the facilities of a trust for catholic boys, or two gentiles have standing to recover the proceeds of a trust for jews. The Fourteenth Amendment does not limit itself to race. It simply says that *no state* may deny the equal protection of the laws, and it means simply that *no state* and no state "agency" may set up one rule for whites and another for negroes, one rule for methodists and another for catholics, or one rule for gentiles and another for jews. These are the fundamentals upon which the doctrine of "state action" under the Fourteenth Amendment is based.

It follows that if the Board of City Trusts, because it is an "agency" of the State, may not administer a trust for whites only, by the same token it may not administer a trust for catholics only or for jews only. The same would follow for any agency of government in a position comparable to that of the Board. To use the example already mentioned, it would mean that no bank, National or State, could serve as trustee for such limited purposes. Thus, this Court's opinion may well mean that untold numbers of charitable trusts which are today administered by governmental "agencies" must either be re-written or the trustee replaced.

The decision creates an extremely delicate problem of the most vital significance. Fairness to the litigants and to the country as a whole demands that such important issues be decided only after the parties have been given their day in court. The problem in this case is not whether the Board of City Trusts is an "agency of the State of Pennsylvania"—admittedly it is that. The problem is whether it is the special kind of agency which in the words of Justice Cardozo is "the repository of official power" (*Nixon v. Condon*, 286 U. S. 73, 88) and which must therefore bestow no benefit nor impose any limitation unless it does so to all equally. It must conform to the equal protection clause of the Fourteenth Amendment only if it is

such a "repository of official power". That, we earnestly contend, The Board of City Trusts most certainly is not. In neither power nor function does it differ from other State "agencies" such as banks and trust companies. An argument on the merits will put these matters in their proper light. A decision as to the nature of the "agency" of the Board of Directors of City Trusts can be made only if the facts are before the Court. We submit that appellee should be given the chance to present those facts fully, dispassionately and with the care that the seriousness of the situation created by this court's *per curiam* opinion demands.

CONCLUSION.

The position which the Girard Will has come to occupy in the minds of the members of the judiciary and the bar is well illustrated in the following excerpt from the opinion of Judge Lefever of the Orphans' Court of Philadelphia County, when this matter was before it (*Girard Estate*, 4 D. & C. 2d 671, 708, 720-721):

> "The will of Stephen Girard has become a legend in Pennsylvania and in the United States. The number of times Girard's will and Girard College are referred to in the books is legion. The will is mentioned in every leading treatise on 'trusts'. Girard's will and the basic decision sustaining it are cited as illustrative of the doctrine of charitable trusts in America. The principle therein established, that a testator may dispose of his private property for the benefit of any class he may select, is firmly imbedded in the laws of this country.
>
> "As stated in Benjamin Franklin's Administratrix v. The City of Philadelphia, et al., 2 Dist. R. 435,

437: 'Stephen Girard's great estate, which now houses, feeds, clothes, and educates 1,500 orphan boys, would if any strained definition of the word "public" were allowed to prevail, be crippled by taxation; yet only a class, and that a small class of people can obtain the benefit of it. Girls are excluded; boys whose fathers are living, are excluded; men and women are excluded; in short, all but "poor white male orphans" are excluded. Nevertheless, it is a great charity, and withstood numerous and persistent attacks in the courts of Pennsylvania and of the United States, *until now it is fixed, firm, and as unmovable as a rock:* Vidal v. Girard's Executors, 2 Howard, U. S. 127; Philadelphia v. Girard's Heirs, 45 Pa. 9; Girard v. Philadelphia, 7 Wallace 1.'" (Emphasis the court's).

Aside from the great and historic interest in the Girard Will the question here presented is one of the first instance and of considerable importance in the field of fiduciary law. Diligence of counsel on both sides has failed to uncover a single case dealing directly with the question herein raised, the applicability of the Fourteenth Amendment to a state or municipal corporation when acting in a fiduciary capacity.

It is difficult to gauge accurately the impact of the decision in this case, as counsel cannot ascertain the number of trust funds administered by state and municipal bodies. The Board of City Trusts holds approximately ninety and there is no reason to think its position is unique. Over and above this, however, the opinion raises questions as to its applicability to such institutions as national banks, trust companies chartered by the several states and trustees appointed by the courts, as well as whether any charitable trusts enforceable by an attorney-general or administered under the jurisdiction of a state court can limit its beneficiaries because of race, creed, color or national origin.

Horace Binney, Esquire, in his superb and convincing argument in defense of Girard's Will before the Supreme Court of the United States (*Vidal, et al. v. The Mayor, Alderman and Citizens of Philadelphia, supra*), said, inter alia, "There is not a charitable society, nor an object of charity in Pennsylvania, nor an institution for the promotion of religion or literature, that is not to be affected by this decision. The magnitude of the estate in controversy disappears before the magnitude of the public interests involved. It is indispensable that we look to our foundations with more than usual care."

That truism so appropriate in 1844 is doubly so in 1957. The motion to dismiss and the brief filed in opposition to the petition for certiorari was not an attempt to set forth in full the position of the trustee in this matter. It was devoted to argument as to why this Court should not assume jurisdiction. What is now sought is an opportunity to set forth fully the reasons in support of the Will of Stephen Girard and its continued administration by the Board of Directors of City Trusts.

There is grave danger that the label "discrimination" may be placed unwittingly on a case which is in no sense deserves that label. History attests to the injustice of acting upon accusations baseless in fact. Use of the labels such as "infidel", "witch", or "traitor", have unquestionably caused serious invasions of the rights of those unjustly accused. This Court has been ever vigilant to protect the citizen against just such invasions. Today "discrimination" is a label. Throughout these proceedings appellants have repeated that label so often that they have successfully created the illusion that the case involves something it does not, i.e. "discrimination". Those persons who look with deep concern not only to the future of Girard's "orphanage" but also to their status as a trustee of charitable trusts identical in many respects to Girard's ask an opportunity to present their case, con-

vinced that by briefs on the merits and oral argument they will be able to establish to the satisfaction of this Court that theirs is not action which in any sense deserves the label "discrimination".

For all of the reasons stated above appellee requests the Court either to grant it a hearing on the merits of the case, or to vacate its decree and dismiss the Petition for Certiorari as improvidently granted.

Respectfully submitted,

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OWEN B. RHOADS,
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Attorneys for Appellee.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

.....
JOSEPH P. GAFFNEY, SR.

.....
OWEN B. RHOADS